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## ARTICLE

### STANDING OUTSIDE OF ARTICLE III

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*The U.S. Supreme Court has insisted that standing doctrine is a “bedrock” requirement only of Article III. Accordingly, both jurists and scholars have assumed*

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that the standing of the executive branch and the legislature, like that of other parties, depends solely on Article III. But I argue that these commentators have overlooked a basic constitutional principle: federal institutions must have affirmative authority for their actions, including the power to bring suit or appeal in federal court. Article III defines the federal “judicial Power” and does not purport to confer any authority on the executive branch or the legislature. Executive and legislative standing instead depend in large part on the provisions conferring power on those institutions—principally, Article II and Article I. This basic insight has important implications. I argue that the Take Care Clause of Article II helps both to explain the breadth and to define the limits of executive standing. The executive branch has standing only insofar as it has an Article II power and duty to enforce and defend federal law on behalf of the federal government. The Take Care Clause does not, however, confer standing when the executive no longer asserts that law-enforcement interest—when it declines to defend a federal law. Article I, for its part, does not confer any power on Congress to enforce or defend federal laws in court. Accordingly, contrary to the assumption of many scholars, Congress lacks standing to represent the United States in place of the executive. The Supreme Court has entirely overlooked these questions of institutional power in considering issues of executive or legislative standing, including, most recently, in the litigation over the Defense of Marriage Act. Article III cannot confer power on the executive or the legislature that Article II or Article I denies.

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## INTRODUCTION

Standing doctrine is often described as a “bedrock” requirement of Article III.<sup>1</sup> Accordingly, jurists and scholars have repeatedly asserted (or assumed) that the standing of Congress and the executive branch, like other actors before the court, depends only on Article III.<sup>2</sup> For example, in *United States v. Windsor*, the Supreme Court held that the executive had “Article III standing” to appeal a lower court decision invalidating the Defense of Marriage Act (DOMA), even though the executive declined to defend DOMA and, in fact, had sought the lower court ruling striking down the law.<sup>3</sup> Although the dissenting opinions sharply disagreed with that conclusion, no Justice doubted that the jurisdictional issue was governed entirely by Article III.<sup>4</sup> Likewise, while the Court did not formally rule on the House

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<sup>1</sup> See *McConnell v. FEC*, 540 U.S. 93, 225 (2003) (“One element of the ‘bedrock’ case-or-controversy requirement is . . . standing to sue.” (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982)))). See generally U.S. CONST. art. III, § 2, cl. 1.

<sup>2</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (holding that the executive branch had Article III standing to appeal a lower court decision invalidating the Defense of Marriage Act (DOMA)); *Newdow v. U.S. Congress*, 313 F.3d 495, 497-98 (9th Cir. 2002) (holding that the Senate lacked Article III standing to defend a statute that added the words “under God” to the Pledge of Allegiance); Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8’s Sponsors, BLAG, and the Government’s Interest*, 161 U. PA. L. REV. ONLINE 164, 165-66 (2013) (contending that the House of Representatives in *Windsor* lacked “Article III standing” to defend DOMA); Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. ST. L.J. 853, 909 (1989) (“Where Congress has authorized the Executive to sue, the Executive has an interest that satisfies article III . . . .”); Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1578-79 (2012) (arguing that the House of Representatives in *Windsor* must “establish Article III standing”); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 261 (2009) (arguing that when the executive enforces federal law, it satisfies Article III standing requirements); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 300 (2005) (“[T]he ‘cases’ and ‘controversies’ that make up the judicial power conferred by Article III include . . . public actions brought by public authorities . . . .”).

<sup>3</sup> 133 S. Ct. at 2683-84, 2686.

<sup>4</sup> Justice Scalia’s dissenting opinion, on behalf of himself, Chief Justice Roberts, and Justice Thomas, contended that the case lacked the requisite Article III “adverseness” because the plaintiff and the executive branch agreed that DOMA was invalid. See *id.* at 2701 (Scalia, J., dissenting) (“Article III requires not just a plaintiff (or appellant) who has standing to complain but *an opposing party* . . . .”); see also *id.* at 2711-12 (Alito, J., dissenting) (asserting that the Court would “render an advisory opinion, in violation of Article III’s dictates,” if it heard the appeal at the executive’s request).

of Representatives' standing to appeal in *Windsor*, the Justices assumed that the House's standing would depend only on an analysis of Article III.<sup>5</sup>

I argue, however, that the standing of the executive branch and the legislature cannot be determined solely by Article III. This assertion rests on a basic constitutional principle: federal institutions must have affirmative authority for their actions. That is no less true with respect to the power to file suit or appeal in federal court. Article III defines the federal "judicial Power" and does not purport to confer any power on the executive or the legislature.<sup>6</sup> Executive and legislative standing must instead stem from the provisions conferring power on those institutions—principally, Article II and Article I.

This insight has important implications. First, Article II helps both to explain the breadth and to define the limits of executive standing. In sharp contrast to private parties,<sup>7</sup> the executive may bring suit to enforce or defend federal law, absent a showing of concrete injury.<sup>8</sup> The executive's

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<sup>5</sup> The Court directed the parties to address whether the House had "Article III standing," 133 S. Ct. 786, 787 (2012), *granting cert. to* 699 F.3d 169 (2d Cir. 2012), but ultimately declined to decide the issue, since it found that the executive had standing. 133 S. Ct. at 2686-88. In their dissenting opinions, Justices Scalia and Alito nevertheless debated the House's Article III standing to appeal. *Compare id.* at 2711-14 & n.1 (Alito, J., dissenting) (concluding that the House had "Article III standing" because the lower court decision striking down the law "impair[ed] Congress' legislative power" and thereby "injur[ed]" the House), *with id.* at 2703-04 (Scalia, J., dissenting) (asserting that the "impairment of a branch's powers alone" does not "confer[] standing"). *See also infra* Section III.A.

<sup>6</sup> Article III does recognize Congress's authority to create inferior courts and to regulate the jurisdiction of the federal courts. U.S. CONST. art. III, §§ 1-2. But Congress's affirmative power comes from Article I. *See* U.S. CONST. art. I, § 8, cl. 9, 18 (empowering Congress "[t]o constitute Tribunals inferior to the supreme Court" and to make laws that are "necessary and proper for carrying into Execution" the federal government's powers); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 80 (most of "Congress' power regarding the judiciary derives" from the Necessary and Proper Clause). The only exception may be the Exceptions Clause of Article III, which seems to give Congress a greater power over the Supreme Court's appellate jurisdiction than might be conferred by the Necessary and Proper Clause alone. *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 938-40 & n.39, 981 & n.279 (2013); *see also* Engdahl, *supra*, at 155 (the Exceptions Clause "enlarge[s] Congress' discretion").

<sup>7</sup> A private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. *See* *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). A private party cannot sue simply to enforce federal law. *See* *FEC v. Akins*, 524 U.S. 11, 23-24 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

<sup>8</sup> *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 667 (2006) ("In suits by the government, courts characteristically make no inquiry into injury."); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 627 (2005) ("Federal courts regularly adjudicate government enforcement actions that would lack 'injury in fact' if brought by private plaintiffs."); *infra* Section I.B (discussing cases recognizing executive standing to enforce federal law).

broad standing arises out of its duty to “take Care that the Laws be faithfully executed.”<sup>9</sup> The Take Care Clause generally requires the executive to protect the federal government’s interests in the enforcement and continued enforceability of its laws—in part by bringing suit and defending federal laws in court. To accommodate the executive’s Article II duties, the federal courts treat such executive actions as Article III “cases” and “controversies.” Executive standing thus depends on a contextual reading of Article II and Article III.

But I argue that the Take Care Clause does not confer on the executive branch unlimited power to invoke federal jurisdiction. The executive has standing *only* when it asserts the federal government’s interests in the enforcement and continued enforceability of federal law. Accordingly, when the executive no longer seeks to protect that law-enforcement interest—when (as in *Windsor*) the executive refuses to defend a federal law—it no longer has an Article II power to invoke federal jurisdiction.<sup>10</sup> In such nondefense cases, the executive seeks further review simply to obtain a higher court resolution of a constitutional question. Although the executive may have strong political and institutional reasons to seek such a judicial decision, no provision of Article II (or any other part of the Constitution) gives the executive branch standing to obtain a judicial settlement of a constitutional question.<sup>11</sup> Absent such affirmative power, the executive lacks standing.

Likewise, the power of the federal legislature to bring suit cannot be determined by reference to Article III alone but depends on the constitutional provisions conferring power on Congress—primarily, those found in Article I. Building on prior work,<sup>12</sup> I argue that the Constitution does not give Congress the power to assert in court the federal government’s inter-

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<sup>9</sup> U.S. CONST. art. II, § 3.

<sup>10</sup> This argument connects the standing inquiry to the ongoing debate over the executive’s “duty to defend” federal laws that the President views as invalid. Compare, e.g., Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1235 (2012) (arguing that “the executive branch should enforce and defend statutes . . . even when it views them as wrongheaded [and] discriminatory”), with Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (arguing that the President should neither enforce nor defend laws that he views as unconstitutional).

<sup>11</sup> As explained below, I do not believe that executive standing in nondefense cases can be justified on the ground that the executive is faithfully executing the Constitution. See *infra* notes 66, 178–83 and accompanying text.

<sup>12</sup> See generally Tara Leigh Grove & Neal Devins, *Congress’s (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

ests in the enforcement or defense of federal law. Absent such affirmative power, Congress also lacks standing. Article III cannot confer on the executive or the legislature a power that Article II or Article I denies.

My arguments as to the scope and limits of executive and legislative standing rest primarily on the constitutional text and structure as well as Supreme Court precedent.<sup>13</sup> However, I also believe that the restrictions on executive and legislative standing have strong normative underpinnings. As political scientists have demonstrated, both the executive branch and Congress have considerable incentives to refer controversial constitutional questions to the judiciary.<sup>14</sup> Constraining the standing of the political branches helps protect the courts from becoming substitute fora for matters that could have been, but were not, resolved through the political process. At the same time, these standing restrictions help protect individual liberty. Neither the executive nor the legislature should be permitted to subject an individual to suit or to further rounds of appeals simply because it may be politically convenient to obtain a judicial resolution of a legal question.

These non-Article III principles have significant implications for legal scholarship and federal litigation. First, this analysis undermines the assumption of jurists, scholars, and the executive branch itself that the executive has complete discretion to enforce a law and then refuse to defend it—thereby teeing up the issue for Supreme Court review.<sup>15</sup> I demonstrate that the executive lacks standing to seek Supreme Court (or other appellate) review when it declines to defend a law. This analysis also shows that,

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<sup>13</sup> Accordingly, throughout this Article, I employ a form of structural inference. For a discussion of the widely accepted practice of making inferences from constitutional structure, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7-32 (1969). See also John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2034-39 (2011) (describing structural inference as an important tool of constitutional analysis and interpretation).

<sup>14</sup> See *infra* Sections II.C, III.B (outlining circumstances where other branches refer matters to the judiciary).

<sup>15</sup> See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994) (“[T]he President may base his decision to comply (or decline to comply) [with a statute] in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 47, 51 (arguing that the President should enforce a law, if that is the only way to “create[] the opportunity for” Supreme Court review); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 n.14 (2001) (“[T]he practice of ‘enforce but decline to defend’ . . . allows the Executive Branch to make its views known to the Court, and ordinarily places before the Court the opportunity to resolve the constitutional dispute between the other two branches.”); *infra* Section IV.A.

contrary to the assumption of many scholars,<sup>16</sup> Congress lacks standing to represent the United States in place of the executive, even in defense of federal law.

At the outset, however, I should clarify a few points. First, throughout this Article, “standing” refers to a litigant’s power to bring suit or appeal in federal court. Although I recognize that standing doctrine has often “give[n] lawyers, scholars and courts considerable difficulty,”<sup>17</sup> that seems to be the most basic meaning of the term.<sup>18</sup> Thus, executive and legislative *standing* refers to the power of those institutions to invoke federal jurisdiction at trial or on appeal—typically, on behalf of the United States. Notably, the Supreme Court has frequently invoked the concept of standing in this way—to signify the power of individuals or institutions to bring suit on behalf of the state or federal government.<sup>19</sup> Accordingly, the questions of

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<sup>16</sup> See, e.g., Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1248 (2012) (arguing that congressional defense does not “raise[] the thorny problem of legislator standing” because “when Congress defends a statute in the Executive’s stead, it is not acting for itself but instead for the United States”); Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-but-Not-Defend Problem*, 81 FORDHAM L. REV. 577, 582, 595-97 (2012) (arguing that “Congress could pass a statute authorizing the Senate or House Counsel, or counsel representing both houses jointly, to litigate . . . on behalf of the United States” to seek a declaratory judgment on the constitutionality of a law that the executive declined to enforce). Other scholars assert that Congress may defend federal laws but do not clearly state whether they believe Congress has standing to do so on behalf of the United States. See, e.g., William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 874 n.260 (2001) (arguing that Congress “has the right to defend [a] statute” when the executive fails to defend it); see also Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 919, 952, 957 n.218, 964-65 & n.239 (2012) (“propos[ing] that Congress take a more active role in federal litigation,” including in defense of laws).

<sup>17</sup> Michael E. Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135, 1138 n.11 (1970) (noting that the term “standing” has often “give[n] lawyers, scholars and courts considerable difficulty” because it has been used “to refer to several quite distinct limitations upon the power and the willingness of federal courts to entertain” cases); see also *infra* notes 21-22 and accompanying text (outlining some of the debates about the nature of standing).

<sup>18</sup> See, e.g., Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 245 (1990) (“Standing focuses on the litigant’s ability to initiate a suit . . .”).

<sup>19</sup> See, e.g., *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664, 2666-68 (2013) (noting that a state attorney general or a state legislator “authorized by state law to represent the State’s interest may satisfy standing requirements,” although holding that the private parties in that case lacked standing to represent the State); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (holding that a private qui tam relator had “representational standing” to bring suit on behalf of the United States to enforce the False Claims Act); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (“[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.”).

institutional power that I focus on are, in my view, properly described as questions of standing.<sup>20</sup>

Second, and relatedly, I focus *only* on executive and legislative standing—that is, whether those institutions have the constitutional authority to take a case to an Article III court. Thus, for example, I argue that the executive lacks standing to appeal unless it defends a federal law. But I do not claim that the executive has a duty to defend federal laws when another party invokes federal jurisdiction (at trial or on appeal), nor do I attempt to determine whether the executive has a duty to enforce some (or all) federal laws. Those are important Article II questions, but they are not questions of standing.

Finally, I do not mean to suggest that the standing of federal institutions has nothing to do with Article III. I assume for purposes of this analysis that standing is a constitutional requirement that is rooted at least in part in the “case” or “controversy” requirement of Article III.<sup>21</sup> I seek, however, to show that Article III alone can neither explain nor justify executive or legislative standing. The determination of whether the executive or legislature may take a given “case” or “controversy” to the courts depends in large part on the constitutional provisions conferring power on those institutions.<sup>22</sup>

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<sup>20</sup> Some readers may view the “institutional power” question differently. At a conceptual level, one might say that the primary standing issue is the “standing” of the United States. The argument might be that a government is “injured” when its laws are violated or struck down by a lower court. But a government cannot bring suit on its own behalf and must rely on others to assert its interests in court. Some readers may conclude that the next question—Who may represent the government in court?—is not strictly one of standing, but rather a (possibly distinct) question of which persons or institutions may serve as the government’s representatives in court. The Supreme Court, however, has repeatedly characterized this question as one of standing. *See supra* note 19; *see also Hollingsworth*, 133 S. Ct. at 2664, 2668 (concluding that private sponsors of a state initiative had “no standing to assert the State’s interests” because they suffered no concrete injury). I adhere to that terminology here and bracket the question whether the Court is correct in analyzing this issue under the rubric of standing.

<sup>21</sup> *See, e.g., Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 82 U.S.L.W. 4195, 4197 (U.S. 2014) (standing doctrine is derived “[f]rom Article III’s limitation of the judicial power to resolving ‘Cases’ and ‘Controversies,’ and the separation-of-powers principles underlying that limitation”). Many scholars, of course, contest this assumption. *See, e.g.,* Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 235 (1992) (“Congress can create standing as it chooses and, in general, can deny standing when it likes.”). The Supreme Court, however, has consistently concluded that standing is a constitutional requirement. I start from that premise and seek to show that executive and legislative standing cannot be determined exclusively by Article III.

<sup>22</sup> One may, of course, question whether the power of any litigant to bring suit or appeal should be an issue of the federal courts’ subject matter jurisdiction. *See, e.g.,* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (“[S]tanding should simply be a question on the merits of plaintiff’s claim.”). For present purposes, I assume that standing, including executive



The argument proceeds as follows. Parts I and II explain how Article II informs the scope of executive standing. The executive's power to bring suit or appeal is tied to its Article II duty to enforce and defend federal law on behalf of the federal government—a reality that calls into question the executive's standing in contexts when it declines to defend a law. Part III argues that the structural Constitution prohibits Congress from delegating to itself the power to represent the United States in court. Finally, Part IV asserts that there would likely be few, if any, negative ramifications if the judiciary enforced these limitations on executive and legislative standing. The executive would face considerable political pressure to defend federal laws on behalf of the United States, so the government would rarely (if ever) be left without a representative in court. At the same time, judicial enforcement of these restrictions would limit the power of Congress or the executive to refer to the judiciary constitutional questions “that they cannot or would rather not address” themselves.<sup>23</sup>

#### I. EXECUTIVE STANDING UNDER ARTICLE II

Although the Supreme Court mentioned Article II in two important standing decisions,<sup>24</sup> the Court has subsequently insisted that standing doctrine is a bedrock requirement only of Article III. Writing for the Court in *Steel Co. v. Citizens for a Better Environment*, Justice Scalia denied that standing doctrine is based on a concern about the “Executive’s power to ‘take Care that the Laws be faithfully executed.’”<sup>25</sup> Justice Scalia declared:

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and legislative standing, is an issue of subject matter jurisdiction that is rooted at least in part in the Article III “case” or “controversy” requirement. My goal here is to show that, even if one assumes these points, executive and legislative standing cannot be determined solely by Article III.

<sup>23</sup> Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 36 (1993); *see also id.* (arguing that “elected officials consciously invite the judiciary to resolve” controversial issues); *infra* Sections II.C, III.B.

<sup>24</sup> *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (declaring that a congressional power to grant standing to any private party to enforce federal law would “permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’”); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (explaining that separation of powers and equitable principles “counsel[] against recognizing standing” in a suit requesting broad injunctive relief against a federal agency because “[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed’”).

<sup>25</sup> 523 U.S. 83, 102 n.4 (1998) (quoting *id.* at 129 (Stevens, J., concurring in the judgment)). In *Steel Co.*, the Court held that an environmental group lacked standing to seek penalties for past violations of a federal statute because the money would be paid to the U.S. Treasury, not to the plaintiff, and thus would not redress any injury to the plaintiff. *Id.* at 106-07.

"The courts must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches. . . . [S]tanding jurisprudence, . . . though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II."<sup>26</sup>

*Windsor* further underscores the Court's focus on Article III. During the oral argument, several Justices raised questions about the executive's Article II power to enforce a law that the President views as unconstitutional (like the Defense of Marriage Act) and then refuse to defend it in court.<sup>27</sup> For example, Chief Justice Roberts suggested that the President should have the "courage of his convictions" and simply refuse to execute the law, "rather than saying, oh, we'll wait till the Supreme Court tells us we have no choice."<sup>28</sup> Likewise, Justice Kennedy found it "very troubling" that the President was enforcing a law that he viewed as unconstitutional but refusing to defend it in court.<sup>29</sup> These Article II concerns were, however, absent from the *Windsor* opinions. In the opinion for the Court, Justice Kennedy found that the executive branch had Article III standing to appeal, despite its decision not to defend DOMA.<sup>30</sup> Likewise, in discussing the executive's power to appeal, Justice Scalia's dissenting opinion made no mention of Article II.<sup>31</sup> Apparently, in the Supreme Court's view, even the executive branch's own standing "derives from Article III and not Article II."<sup>32</sup>

The Justices' view of executive standing accords with the scholarly consensus. Scholars have not examined executive standing in depth. But to the extent that commentators have considered the issue, they have assumed—virtually without exception—that executive standing is governed only by

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<sup>26</sup> *Id.* at 102 n.4.

<sup>27</sup> The Attorney General announced this enforce-but-not-defend approach in a letter to Congress. See Letter from Eric H. Holder, Jr., Attorney Gen. of the U.S., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder Letter] (stating that the executive adopted this approach after the President concluded that DOMA violated equal protection principles); *infra* Section II.B.

<sup>28</sup> Transcript of Oral Argument at 12, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (statement of Chief Justice Roberts).

<sup>29</sup> *Id.* at 21-22 (statement of Justice Kennedy) (comparing the practice of enforcing but not defending a law to the "questionable" practice of a President signing a law but issuing a signing statement declaring that the law is unconstitutional).

<sup>30</sup> *Windsor*, 133 S. Ct. at 2686.

<sup>31</sup> See *supra* note 4 (noting that Justice Scalia focused on the lack of Article III "adverseness"); *infra* subsection II.B.1. Justice Scalia referenced the Take Care Clause only in arguing that the House of Representatives lacked standing in *Windsor*. See 133 S. Ct. at 2703 (doubting that Congress could "hale the Executive before the courts" to ensure the faithful execution of the laws).

<sup>32</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998).

Article III.<sup>33</sup> I argue, however, that executive standing depends in large part on the powers and duties in Article II.

#### A. *The Article II Foundations of Executive Standing*

My argument rests on a basic principle of federal constitutional law: federal institutions—in sharp contrast to private parties, states, or localities—must have affirmative authority for their actions, including the power to bring suit in federal court.<sup>34</sup> Article III defines the federal “judicial Power” and specifies that this power extends to “cases” arising under federal law and “controversies” involving the United States.<sup>35</sup> But Article III does not purport to confer any authority on the executive to bring suit or appeal—either on behalf of the United States or otherwise.<sup>36</sup> Affirmative authority for executive standing must be found in Article II.

No provision of Article II expressly authorizes the executive branch to bring suit or appeal. Much of Article II is concerned with administrative, foreign policy, or military matters, such as the Appointment and Treaty Clauses.<sup>37</sup> The Vesting Clause of Article II, which vests the “executive

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<sup>33</sup> See *supra* note 2 (listing sources). There are two exceptions. In prior work, Edward Hartnett and I separately asserted that executive standing to bring criminal or civil enforcement actions depends on Article II. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 794-95 (2009); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2256 (1999). But both Professor Hartnett’s essay and my own prior work focused on the restrictions on private-party standing to enforce federal law. This Article, by contrast, focuses on the scope and limits of executive standing.

<sup>34</sup> See U.S. CONST. amend. X; see also *New York v. United States*, 505 U.S. 144, 155 (1992) (stating that “no one disputes the proposition that [t]he Constitution created a Federal Government of limited powers,” and noting that the Tenth Amendment makes this principle “explicit” (alteration in original) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991))).

<sup>35</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party . . . .”); see also William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 266 (1990) (stating that the term “controversies” was to be limited to civil actions, while the term “cases” encompassed both civil and criminal suits).

<sup>36</sup> See U.S. CONST. art. III, § 1.

<sup>37</sup> See *id.* art. II, § 2 (conferring on the President the power to appoint executive and judicial officers, make treaties, issue pardons, seek opinions in writing from department heads, and serve as the “Commander in Chief” of the armed forces); *id.* art. II, § 3 (authorizing the President to “receive Ambassadors and other public Ministers”). Article II also gives the President a role in advising Congress on the “State of the Union” and suggesting legislation. *Id.*

Power” in the President,<sup>38</sup> likely confers some power to bring suit, given that the authority to enforce or defend federal laws in court is an integral part of law execution.<sup>39</sup> But any such “executive Power” is qualified by the Take Care Clause, which imposes on the President a duty to “take Care that the Laws be *faithfully* executed.”<sup>40</sup> Accordingly, I treat the Take Care Clause as the primary Article II source of executive standing.<sup>41</sup>

As described further below, in order to fulfill this faithful execution duty, the executive must often go to court to enforce and defend federal law on behalf of the United States. Notably, Article II helps explain the contrast between the standing of the executive branch and that of other actors. Article III makes clear that the terms “case” and “controversy” include criminal and civil disputes involving the United States.<sup>42</sup> Moreover, it seems clear that, as a sovereign, the United States has a judicially cognizable interest in the enforcement and defense of federal law.<sup>43</sup> Under current law, the executive may assert in court the federal government’s sovereign interests without satisfying the injury, causation, or redressability requirements that the judiciary applies to other actors.<sup>44</sup> Article III alone cannot

<sup>38</sup> *Id.* art. II, § 1, cl. 1.

<sup>39</sup> See Sections I.B–C (discussing the importance to law execution of federal court enforcement and defense actions).

<sup>40</sup> U.S. CONST. art. II, § 3 (emphasis added); see Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 33 (similarly observing that the “presidential power of law execution granted by the Vesting Clause” is “cabined by the Take Care Clause”).

<sup>41</sup> Scholars have at times asserted that the Take Care Clause is not a grant of power but serves only to qualify the “executive Power” conferred by the Vesting Clause. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992) (suggesting that the “use of the verb ‘take care’ in the Take Care Clause bolsters the power-grant reading of the Vesting Clause of Article II”). However, to the extent that the Take Care Clause *requires* the President to take action to “faithfully execute” the law, the Clause may imply that the President has the power to take such action. Accordingly, the Take Care Clause may be both a grant of power and the imposition of a duty. In any event, to the extent that the Vesting Clause is the source of executive power to bring suit in court, that power is qualified by the Take Care Clause. Accordingly, I focus on the latter Clause throughout this Article.

<sup>42</sup> See *supra* note 35.

<sup>43</sup> See *infra* Sections I.B–C (discussing how courts have recognized the federal government’s interests in the enforcement and continued enforceability of its laws).

<sup>44</sup> See Jonathan R. Siegel, *Congress’s Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44, 67–68 (1999) (noting that the government need not show injury in fact); see also *infra* Sections I.B–C; *supra* notes 7–8 and accompanying text. The Court has applied the injury, causation, and redressability tests to state government plaintiffs that seek to enforce federal law. See *Massachusetts v. EPA*, 549 U.S. 497, 520, 521–26 (2007) (holding that Massachusetts had standing to challenge EPA’s denial of its rulemaking petition because EPA’s conduct presented a “risk of harm” and there was a “substantial likelihood that the judicial relief requested” w[ould] prompt EPA to take steps to reduce that risk” (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 79 (1978))). A state, however, has broad standing to assert its sovereign

explain why such an executive-initiated action qualifies as an Article III “case” or “controversy” while analogous private-party actions do not; after all, a private party might also want to enforce or defend federal law on behalf of the United States.<sup>45</sup> But this dichotomy makes more sense once we take into account the fact that Article II *requires* the executive to assert in court the abstract, generalized interest in enforcing federal law.<sup>46</sup> To accommodate the executive’s Article II responsibilities, the federal judiciary treats executive enforcement and defense actions as “cases” and “controversies” under Article III.<sup>47</sup>

In this way, executive standing depends on the intersection of Article II and Article III. The Take Care Clause of Article II imposes constitutional duties on the executive that it cannot perform without resort to Article III

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interest in the continued enforceability of *state* law, when that law is challenged in federal court. See *infra* notes 80-81 and accompanying text.

<sup>45</sup> If a private party sought to invoke federal jurisdiction, asserting nothing more than the United States’ sovereign interest in the enforcement of its laws, the judiciary would hold that the private party lacks standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (“[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy.”). The Supreme Court has permitted private parties to sue on behalf of the federal government only to vindicate common law proprietary interests. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771, 773-74 (2000) (upholding the standing of a private *qui tam* relator to enforce the False Claims Act and thereby vindicate the government’s “proprietary injury resulting from . . . alleged fraud”). Although the distinction between “sovereign” and “proprietary” interests may not be satisfactory, I think it is difficult to read *Stevens* as a license for Congress to grant private parties standing to represent the United States’ sovereign interests in court. For a different perspective, see Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 105-08 & n.203 (2007) (interpreting *Stevens* to suggest that the “*qui tam* tradition” “allows Congress to confer standing upon plaintiffs suffering no distinctive injury” for Article III purposes).

<sup>46</sup> Cf. *FEC v. Akins*, 524 U.S. 11, 23-24 (1998) (holding that private plaintiffs lack standing to assert “abstract,” “generalized grievance[s]”—like the “interest in seeing that the law is obeyed” (alteration in original)). For present purposes, I assume, without defending, the validity of these constraints on actors other than the executive branch. In prior work, I have defended the constraints on private-party standing to enforce federal law on Article II nondelegation grounds. See generally *Grove*, *supra* note 33 (arguing that standing limits private prosecutorial discretion). For other recent defenses of the limits on private-party standing, see MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 159 (2000) (asserting that standing helps prevent litigants “from strategically timing cases . . . to manipulate the substantive evolution of constitutional doctrine”), and Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1664 (2007) (contending that standing helps “prevent the inefficient disposition of constitutional entitlements”).

<sup>47</sup> Cf. *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (“[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996))).

courts. These Article II duties, in turn, inform the way in which federal courts construe the “case” or “controversy” language of Article III.

### B. *Standing to Enforce Federal Law*

In order to punish and deter violations of federal law, the executive must have the power to bring suit against alleged violators.<sup>48</sup> The executive generally cannot, consistent with the requirements of due process, simply impose criminal or civil penalties; there must be an opportunity for judicial review (at least after the fact).<sup>49</sup> As a result, the executive must often rely on the courts “for the enforcement of coercive sanctions.”<sup>50</sup> In short, to carry out its duty to faithfully execute the laws, the executive needs to have standing to bring criminal and civil enforcement actions.

It is therefore unsurprising that the Supreme Court has consistently recognized the executive branch’s standing to enforce federal law. Indeed, the Court has never denied executive standing when it had statutory authorization.<sup>51</sup> For example, in *United States v. Raines*, the executive brought suit under the Civil Rights Act of 1957,<sup>52</sup> alleging that certain local election officials discriminated on the basis of race in registering voters.<sup>53</sup>

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<sup>48</sup> See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863 (1982) (observing that a criminal prosecution is “one example of the Executive’s effort to discharge [its] responsibility” to faithfully execute the laws); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (“A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”); Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2303-04 (2006) (“[T]he Take Care Clause contemplates a presidential responsibility to carry out the legislative mandate.”).

<sup>49</sup> See U.S. CONST. amend. V; Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 538-39 (2005) (“Under our system of separated powers, the executive cannot unilaterally enforce the law’s penalties[, but must] seek the judiciary’s sanction . . . .”); see also *Mathews v. Eldridge*, 424 U.S. 319, 332, 339 (1976) (“The ‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.’” (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

<sup>50</sup> Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

<sup>51</sup> See *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129-30, 133-34 (1995) (holding that an agency official lacked standing, absent statutory authorization, but stating that “Congress *could* have conferred standing . . . without infringing Article III of the Constitution”); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 473 (1995) (“The problems with governmental standing in the nineteenth century arose primarily because the legislature of the sovereign in whose courts a government litigant sued had not authorized suit. Once such statutory authority was provided, the legitimacy problem disappeared.”).

<sup>52</sup> Civil Rights Act of 1957, pt. IV, Pub. L. No. 85-315, 71 Stat. 634, 637-38 (codified as amended at 42 U.S.C. § 1971 (2006)).

<sup>53</sup> 362 U.S. 17, 19-20 (1960).

Although the local officials argued that Congress lacked the power “to authorize the United States to bring this action in support of private constitutional rights,”<sup>54</sup> the Supreme Court upheld executive standing, stating that it was “perfectly competent for Congress to authorize the United States to be the guardian of that public interest.”<sup>55</sup>

The Supreme Court has also occasionally upheld executive standing to enforce federal law when it lacked explicit statutory authorization. For example, in *In re Debs*, the Court concluded that the executive had standing to enjoin the Pullman railroad strike, which allegedly violated various federal statutes.<sup>56</sup> The Court declared that the federal government’s “obligation[] . . . to promote the interest of all, and to prevent the wrongdoing of one . . . , is often of itself sufficient to give it a standing in court.”<sup>57</sup>

Since *Debs*, jurists and scholars have debated the scope of the executive’s power to enforce federal law, absent statutory authority.<sup>58</sup> I do not seek to enter that debate; as a practical matter, the executive has broad statutory standing to bring enforcement actions.<sup>59</sup> My focus is instead on a subject that scholars have not carefully examined—the nature and scope of the executive’s constitutional standing to enforce federal law.

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<sup>54</sup> *Id.* at 27.

<sup>55</sup> *Id.*; see also *United States v. Mississippi*, 380 U.S. 128, 136-37 (1965) (upholding executive standing to protect voting rights, given “express congressional authorization”).

<sup>56</sup> See 158 U.S. 564, 570, 599-600 (1895) (upholding executive standing to prevent interference with the transport of U.S. mail), *overruled on other grounds by* *Bloom v. Illinois*, 391 U.S. 194 (1968). For an account of the events leading up to *Debs*, see OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 53-74 (1993).

<sup>57</sup> *In re Debs*, 158 U.S. at 584.

<sup>58</sup> Compare, e.g., Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 114-16 (1997) (arguing that the executive branch has implied power to enforce the Fourteenth Amendment), with Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 11 (1993) (contending that the executive has only a limited power to “protect and defend the personnel, property, and instrumentalities of the United States from harm”), with Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 5 (2014) (arguing that courts should imply a cause of action “when a public litigant sues to protect typically public interests” but not when it sues to protect private interests); see also *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980) (holding that “the United States may not sue [a local police department] to enjoin violations of individuals’ fourteenth amendment rights without specific statutory authority”).

<sup>59</sup> Indeed, Congress has at times stepped in to augment the executive’s statutory authority when courts held that it lacked standing. See, e.g., Civil Rights of Institutionalized Persons Act, § 3, Pub. L. No. 96-247, 94 Stat. 349, 350 (1980) (codified as amended at 42 U.S.C. § 1997a (2006)) (conferring standing to protect the constitutional rights of prisoners); see also *City of Philadelphia*, 644 F.2d at 201-02 & n.22 (discussing this legislation and the history of its enactment).

First, I want to underscore an important limit on executive standing. The executive has broad standing only to assert the *federal government's* sovereign interest in the enforcement of its laws. Accordingly, in *Debs* and *Raines* (and similar cases), the Court discussed the standing of the "government" or the "United States," not the executive.<sup>60</sup> The Supreme Court has never held that the executive has standing to assert an institutional interest in the enforcement of federal law or, relatedly, in protecting any other duties or powers conferred by Article II. In fact, the Court has suggested precisely the opposite: the executive lacks standing to protect its institutional concerns.<sup>61</sup>

The Supreme Court recognized this limitation on executive standing (albeit only in dicta) in *Raines v. Byrd*, when it held that six legislators lacked standing to challenge the Line Item Veto Act based on an alleged "institutional injury."<sup>62</sup> The Court emphasized that in past "confrontations between one or both Houses of Congress and the Executive Branch" involving the President's removal power, the pocket veto, and the legislative veto, "no suit was brought on the basis of claimed injury to official authority or power."<sup>63</sup> Instead, the issues were brought to the judiciary by "plaintiff[s] with traditional Article III standing."<sup>64</sup> This "historical practice" tends to cut against any claim of "institutional injury" by the executive or the legislature (at least one arising out of the enactment of a federal law).<sup>65</sup> *Raines* thus supports my assertion that the executive has standing to

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<sup>60</sup> *Raines*, 362 U.S. at 27 (holding that Congress may "authorize the United States" to enforce civil rights laws); *In re Debs*, 158 U.S. at 583 (stating that "the government has such an interest . . . as enables it to appear as party plaintiff"); see also *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 425-26 (1925) ("[The United States] has a standing in this suit not only to remove obstruction to interstate and foreign commerce, . . . but also to carry out treaty obligations . . .").

<sup>61</sup> See *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 130 (1995) (doubting that the "mere existence and impairment of [an executive official's] governmental interest" could alone "ever suffice" for standing purposes).

<sup>62</sup> See 521 U.S. 811, 814, 817, 821, 829-30 (1997). The legislators alleged that the President's power to veto specific parts of legislation would "dilute[] their Article I voting power." *Id.* at 817 (citation omitted).

<sup>63</sup> *Id.* at 826-28.

<sup>64</sup> *Id.* at 827.

<sup>65</sup> See *id.* at 826 (stating that "historical practice . . . cut against" a finding of standing). As discussed below, I do not mean to foreclose the possibility that federal institutions may have standing to assert some "institutional interests." See *infra* note 209 and accompanying text (explaining how the House and the Senate likely have standing to enforce their internal rules by, for example, bringing subpoena enforcement actions against individuals who refuse to testify in Congress). Here, I seek only to show that precedent strongly suggests that when the executive brings suit to enforce or defend federal law, it does so on behalf of the United States. For an



assert the interests of the federal government, not the executive. The interests of the executive may not be coextensive with those of the United States.

This limitation underscores the way in which executive standing depends on the intersection of Article II and Article III. The executive has standing to perform Article II duties that it cannot perform except through the Article III courts. The executive often cannot enforce federal law except through the courts; due process principles require judicial review when individuals object to the imposition of civil or criminal sanctions. Nor, as discussed below, can the executive protect the continued enforceability of federal law absent standing to defend those laws in court.

By contrast, the executive can protect its institutional interests against congressional interference without resort to the courts; the President can, for example, veto or refuse to enforce measures (if enacted) that interfere with presidential prerogatives. Likewise, as I explain below, the executive can “faithfully execute” the Constitution without resort to an Article III court—by simply refusing to enforce a law that the President views as unconstitutional. The executive does not need judicial permission when it *declines* to enforce a law.<sup>66</sup> The executive must go through the judiciary only to protect the federal government’s interest in the *enforcement* of its laws against third parties. For that reason, the federal courts treat such executive enforcement and defense actions as Article III “cases” or “controversies.”

Second, and conversely, I also want to underscore the breadth of executive standing—even when the executive serves only as the representative of the federal government. The executive has the constitutional authority to enforce *any* federal law. Accordingly, the executive branch may bring suit against any person for any legal violation. That is a tremendous discretionary power—one that creates the potential for discriminatory, or simply arbitrary, enforcement.<sup>67</sup> As then–Attorney General (and later Supreme Court Justice) Robert Jackson stated:

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argument that institutions, rather than private parties, should presumptively have standing to assert their own institutional interests, see Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440–41 (2013).

<sup>66</sup> See *infra* notes 178–83 and accompanying text.

<sup>67</sup> See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686–97 (2004) (arguing that courts should review enforcement decisions to “prevent[] arbitrary agency decisionmaking”); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) (“The deficiency of prosecutorial discretion lies . . . in the randomness and arbitrariness of its application.”); Kenneth Culp Davis,

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted . . . . It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.<sup>68</sup>

I emphasize the concerns raised by scholars in the enforcement context for two related reasons. First, as discussed below, the executive exercises similarly broad (and largely overlooked) discretion in the defense context—to intervene in and appeal any case involving a constitutional challenge to a federal law. Second, many scholars advocate a “congressional counsel” that would have the same broad discretion to intervene in any suit to (at least) defend federal law. Although there may be reasons for limiting executive discretion to invoke the federal judicial power, I argue in Part III that there is little basis for transferring such discretionary power to Congress.

That seems particularly true, given that the primary check on executive discretion is Congress.<sup>69</sup> Congress can, for example, limit the executive through oversight hearings,<sup>70</sup> statutes that set enforcement priorities,<sup>71</sup> or the appropriations power.<sup>72</sup> Furthermore, in egregious cases, Congress can impeach and remove executive officials, including the Attorney General or the President, for a failure to faithfully execute the law.<sup>73</sup> It is not clear who would oversee a “congressional counsel” that had the power to represent the United States in court.

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*Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 218-25 (1949) (expressing concerns about “administrative arbitrariness”).

<sup>68</sup> Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

<sup>69</sup> Executive enforcement decisions are also subject to some internal executive controls. See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 960 n.303 (2000) (noting that the Executive Office of U.S. Attorneys conducts reviews to ensure that field offices “comply[] with Department policies and procedures”). They are also subject to a very limited form of judicial review. See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that the executive may not prosecute an individual for “exercis[ing] . . . protected statutory and constitutional rights”).

<sup>70</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 791 (1999).

<sup>71</sup> See *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

<sup>72</sup> See Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 418 (1982).

<sup>73</sup> See U.S. CONST. art. I, § 2, cl. 5 & § 3, cl. 6.

### C. Standing to Defend Federal Law

The defense of federal statutes is, like enforcement, a central part of the faithful execution of the law. To enforce any law in federal court, the executive must be prepared to defend that law against constitutional challenge. For example, in *United States v. Raines*, the local officials not only contested executive standing but also alleged that the Civil Rights Act of 1957 was an invalid exercise of Congress's enforcement power under the Fifteenth Amendment.<sup>74</sup> To continue the enforcement action, the executive had to defeat that constitutional challenge.<sup>75</sup>

Other cases commence as suits for a declaratory judgment to avert the future enforcement of federal law.<sup>76</sup> When a private party initiates the lawsuit, the executive need not, of course, demonstrate standing in the trial court. But the executive must have standing to appeal.<sup>77</sup> For example, in *Gonzales v. Raich*, two women brought suit against the Attorney General to "prohibit[] the enforcement of the federal Controlled Substances Act" in cases involving the possession of home-grown marijuana.<sup>78</sup> When the Ninth Circuit struck down the statute as applied in such cases, the executive had standing to seek further review to ensure the continued enforceability of that federal law.<sup>79</sup>

Although the Supreme Court has not addressed executive standing in a case where it defended the constitutionality of a law (nondefense cases are discussed below), the Court has recognized these principles in the context of state law.<sup>80</sup> In *Maine v. Taylor*, the Court held that a state had standing to

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<sup>74</sup> 362 U.S. 17, 20 (1960).

<sup>75</sup> The lower court held that the Civil Rights Act of 1957 exceeded Congress's enforcement power under the Fifteenth Amendment. On appeal by the executive, the Supreme Court reversed. *See id.* at 24-26.

<sup>76</sup> Under the Court's current standing jurisprudence, the enforcement must be "imminent." *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147-48 (2013).

<sup>77</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (stating that the "party invoking federal jurisdiction bears the burden of establishing" the elements of standing).

<sup>78</sup> 545 U.S. 1, 7-8 (2005).

<sup>79</sup> *Id.* at 7-9 (observing that the executive sought review of the Ninth Circuit's decision). The Court rejected the Commerce Clause challenge. *Id.* at 25-26, 31-33.

<sup>80</sup> *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional." (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986))); *Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). There may, of course, be differences between federal and state standing. For example, state legislatures may have broader standing than the federal legislature. Although I argue that Congress may not represent the federal government in court, *see infra* Part

appeal a lower court decision invalidating a state law (even though the state had not initiated the lower court action), on the ground that “a State clearly has a legitimate interest in the continued enforceability of its own statutes.”<sup>81</sup> Likewise, the executive branch has standing to assert the federal government’s interest in the “continued enforceability” of its laws.

By statute, the executive even has standing to defend federal laws that it does not enforce. Under 28 U.S.C. § 2403, the executive may intervene in any federal court action in which a litigant challenges the constitutionality of a federal statute.<sup>82</sup> Upon intervening, the executive may exercise “all the rights of a party,” including the right to present evidence and to appeal, “to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.”<sup>83</sup> The executive has relied on § 2403 to defend and appeal lower court decisions invalidating, for example, the civil enforcement provisions of the Violence Against Women Act as well as countless provisions that purport to abrogate state sovereign immunity in private suits.<sup>84</sup>

Some commentators have suggested that if the executive has standing to defend laws that it does not execute, then there must be no necessary connection between constitutional defense and law execution. Accordingly, other actors, including Congress, may intervene in defense of federal laws—despite the fact that Congress has no role in law enforcement.<sup>85</sup> But that

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III, state legislatures may assert their states’ sovereign interests. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (“[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.”). But that is simply a question of *which institutions* may assert the government’s interest in the continued enforceability of its laws. The state and federal governments are quite analogous insofar as they seek to vindicate a sovereign interest in defending their laws.

<sup>81</sup> 477 U.S. at 137. In *Taylor*, the federal government criminally prosecuted a defendant for violating a federal statute that prohibited, among other things, the importation of fish or wildlife “in violation of any law or regulation of any State.” *Id.* at 132–33 (quoting 16 U.S.C. § 3372(a)(2)(A) (1982)). When a lower federal court held the relevant state law invalid (and thus an improper basis for the prosecution), the federal government did not seek further review. *Id.* at 133. Only Maine took the case to the Supreme Court. *Id.* at 136–37.

<sup>82</sup> 28 U.S.C. § 2403(a) (2012).

<sup>83</sup> *Id.* The law requires courts to notify the Attorney General about any constitutional challenge and to give the “United States” an opportunity to intervene. *Id.*

<sup>84</sup> *See, e.g., United States v. Georgia*, 546 U.S. 151, 155 (2006) (noting that the federal government intervened and appealed “to defend the constitutionality of [the] abrogation of state sovereign immunity” in Title II of the Americans with Disabilities Act of 1990); *United States v. Morrison*, 529 U.S. 598, 601–02, 604 (2000) (observing that the government intervened and appealed “to defend [the] constitutionality” of a provision in the Violence Against Women Act of 1994 creating “a federal civil remedy for the victims of gender-motivated violence”).

<sup>85</sup> *See infra* notes 230–34 and accompanying text (responding to scholarly arguments that “enforcement” is separate from “defense”). For example, during the *Windsor* litigation, the House of Representatives pointed to executive standing under § 2403 as support for its own standing to

argument overlooks both the Article II basis and the nature of executive standing. The executive has standing to protect the federal government's interest in the continued *enforceability* of its laws. By directing the President to "take Care that the Laws *be* faithfully executed,"<sup>86</sup> Article II seems to authorize executive standing to protect that government interest, even if the executive itself will not be doing the enforcing.<sup>87</sup> By contrast, as discussed in Part III, Congress has no similar constitutional license to assert the government's interests in court.

Notably, this intervention power significantly expands the executive's discretion to invoke federal jurisdiction in defense cases. As a matter of practice (if not constitutional compulsion) in suits against the government, if the executive decides to defend a federal statute, it appeals *every* lower court order striking down that law.<sup>88</sup> By contrast, the executive is far more selective about the cases in which it intervenes and appeals under § 2403.<sup>89</sup> This broad discretionary power raises many of the concerns that Justice Jackson highlighted in the context of enforcement actions.<sup>90</sup> The executive could intervene in and appeal cases for discriminatory, arbitrary, or purely political reasons, subjecting only some litigants to further judicial process. Indeed, given the executive branch's success rate in the courts of appeals and the Supreme Court, influential litigants have a strong incentive to lobby for federal intervention.<sup>91</sup>

Such a discretionary power may be justifiable for the reasons that Justice Jackson offered in support of executive enforcement discretion. He suggested

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defend federal laws, despite the fact that it has no role in law enforcement. *See* Brief on Jurisdiction for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (emphasizing that the executive may intervene even when it has "no enforcement role").

<sup>86</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>87</sup> Such a construction of the Take Care Clause seems at least sufficiently permissible that Congress could conclude that executive intervention is a "necessary and proper" means of protecting the government's interests. *See id.* art. I, § 8, cl. 18.

<sup>88</sup> *See* The Attorney Gen.'s Duty to Defend the Constitutionality of Statutes, 5 Op. O.L.C. 25, 25-26 (1981) (asserting that the executive has a "duty to defend" every statute, unless it infringes on executive power or is clearly invalid).

<sup>89</sup> *See* Drew S. Days, III, *No Striped Pants and Morning Coat: The Solicitor General in the State and Lower Federal Courts*, 11 GA. ST. U. L. REV. 645, 654-55 (1995) (discussing how the Solicitor General's office exercises its discretion to intervene).

<sup>90</sup> *See* Jackson, *supra* note 68, at 5.

<sup>91</sup> For a discussion of the government's litigation advantage, see Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in *IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?* 342, 342-70 (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

that we allow executive officials to exercise broad discretion, not because we are confident that they will always act appropriately, but because the federal government needs a representative in court to prosecute violations of federal law.<sup>92</sup> Likewise, when Congress enacted the intervention statute in 1937, it concluded that the government needed a representative in court to defend federal laws—at that time, New Deal legislation that was repeatedly challenged in private litigation.<sup>93</sup>

My goal, however, is not to defend the current scope of executive standing. Congress should perhaps, by statute, curtail executive discretion to invoke federal jurisdiction in both the enforcement and the defense contexts.<sup>94</sup> I offer this survey to show the constitutional scope of executive standing. The executive has standing to perform Article II duties that it cannot perform except through the Article III courts. The Take Care Clause generally imposes on the executive a duty to enforce and to protect the enforcement of federal laws on behalf of the federal government. The executive often cannot protect that interest—that is, it cannot ensure that federal laws are enforced against third parties—without resort to the judiciary. By contrast, as I argue below, the Take Care Clause does not authorize executive standing in nondefense cases, when the executive no longer asserts that law-enforcement interest, and no provision of the Constitution grants Congress the power to represent the United States in court.

## II. ARTICLE II AND EXECUTIVE NONDEFENSE

The executive's refusal to defend the law in *Windsor* and other prominent cases has drawn considerable attention to executive standing in

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<sup>92</sup> Jackson, *supra* note 68, at 3.

<sup>93</sup> At the time, there were reports of "collusive suits" (often between shareholders and corporations) brought solely to attack New Deal legislation. See *The Judiciary Act of 1937*, 51 HARV. L. REV. 148, 148-49 & n.3 (1937); *Revision of Procedure in Constitutional Litigation: The Act of 1937*, 38 COLUM. L. REV. 153, 153-54 (1938) (noting the concern about collusive suits and Congress's view that private parties often lacked "the financial means to handle constitutional litigation adequately"). Soon after the law's passage, the government sought to intervene in and appeal a lower court ruling in a "collusive suit." See *United States v. Johnson*, 319 U.S. 302, 302-05 (1943) (holding that a landlord and tenant colluded to challenge federal rent controls).

<sup>94</sup> Given the importance of enforcement and defense actions to faithful execution, there may be constraints on Congress's power to limit executive standing. Article II may require some "essential role" for the executive branch, as scholars have argued in the context of the judiciary. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). I do not seek to resolve that issue here.

nondefense cases.<sup>95</sup> But the discussion thus far has occurred in a vacuum—without much consideration of why the executive *typically* has standing in federal court. In part for that reason, as *Windsor* illustrates, scholars and jurists have treated executive standing as an issue that can be answered solely by reference to Article III. But as I demonstrate in this Article, executive standing depends in large part on the powers and duties conferred by Article II.

Drawing on this analysis, I argue that the Take Care Clause informs both the scope and the limits of executive standing. The executive has standing to appeal a decision invalidating a federal law only if it has an Article II power and duty to enforce (or protect the enforcement of) that law. In that event, the executive has standing—as it typically does—to assert the federal government’s interest in the continued enforceability of the law against third parties. The executive lacks standing, however, when it no longer asserts that law-enforcement interest—that is, when it asks a court to strike down a federal law. In the latter scenario, the executive seeks only a higher court resolution of a difficult constitutional question. Although the executive may have strong political and institutional reasons to seek such a judicial decision, no provision of Article II (or any other part of the Constitution) gives the executive branch standing to obtain a judicial settlement of a constitutional question. In fact, there are strong normative reasons to deny executive standing in this context.

#### A. Article II Power as a Preliminary Question

To have standing to appeal, the executive must possess the Article II power to assert the federal government’s interest in the continued enforceability of the federal law at issue—even if the President deems the law unconstitutional. Under certain theories of Article II, the executive lacks such power in at least some cases. For example, Raoul Berger argued that the President has a duty *not* to enforce a law that infringes on executive

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<sup>95</sup> See *infra* subsection II.B.2 (discussing executive appeals in prominent nondefense cases). The executive has likewise refused to defend—and, in fact, has sought the invalidation of—a number of other federal statutes in recent decades. See Devins & Prakash, *supra* note 10, at 561 (reporting that, from December 1975 until May 2011, the executive declined to defend at least seventy-five federal statutory provisions).

power.<sup>96</sup> Other scholars, including Gary Lawson, Neal Devins, and Sai Prakash, assert that the executive has a duty not to enforce *any* law that the President considers invalid,<sup>97</sup> maintaining that the executive must instead “defend and execute [its view of] the Constitution.”<sup>98</sup>

The Supreme Court has failed to grapple with this preliminary question of institutional power. *Windsor* offers an illustration. Although Justice Kennedy suggested during oral argument that the executive branch lacked the Article II power to enforce the Defense of Marriage Act once the President concluded that it was unconstitutional,<sup>99</sup> his opinion for the Court made no mention of Article II. Instead, the Court held that the executive had Article III standing to appeal the lower court decision striking down DOMA.<sup>100</sup> But if the executive lacks the Article II power to enforce a law, then it clearly lacks Article III standing to appeal. Under that view, the executive branch may not, consistent with Article II, take any action that prolongs the enforcement of the law—and thus plainly cannot assert in court the federal government’s interest in the continued enforceability of the law. Article III cannot confer on the executive a power that Article II denies.<sup>101</sup>

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<sup>96</sup> See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306-09 (1974) (arguing that the President has “a right and a duty to protect his own constitutional functions from congressional impairment”).

<sup>97</sup> See Devins & Prakash, *supra* note 10, at 509 (arguing that the President should not enforce or defend laws he deems unconstitutional); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303 (1996) (asserting that if “the President determines that a statute is unconstitutional,” he must refuse to enforce it); see also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221-22 (1994) (arguing that the President “may decline to execute acts of Congress on constitutional grounds”).

<sup>98</sup> Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1627 (2008); see also John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 369-70 (1998) (“The President cannot faithfully execute both the Constitution and [what he views as an invalid] statute.”).

<sup>99</sup> See Transcript of Oral Argument, *supra* note 28, at 21 (statement of Justice Kennedy) (asking why the President enforced DOMA, given his determination that the law was unconstitutional).

<sup>100</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2686-88 (2013).

<sup>101</sup> None of this is to suggest that the federal government lacks an interest in the continued enforceability of the law—only that the executive lacks the affirmative power to assert that interest. If Congress disagrees with an executive nonenforcement decision, it has various ways—such as appropriations, oversight hearings, and political pressure—to contest the executive’s failure to enforce or to appeal. See *supra* notes 70-73 and accompanying text.



B. *Standing (Only) to Defend Federal Law*

Other theories of Article II would enable the executive to assert the federal government's interest in the continued enforceability of a federal statute, even when the President has doubts about the constitutionality of the law or firmly believes the law is invalid. In fact, some scholars, including Edward Corwin and Eugene Gressman, have asserted that the executive branch must enforce virtually every, if not every, federal statute.<sup>102</sup> Under this view, "once a statute has been duly enacted, whether over [the President's] protest or with his approval, he must promote its enforcement by all the powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process."<sup>103</sup> Other scholars reject this categorical approach but agree that the President must enforce at least some laws that he considers invalid.<sup>104</sup>

In standing terms, if the executive has an Article II duty to enforce a given federal statute, then it has not only the power but also the *duty* to protect the federal government's sovereign interest in the continued enforceability of that federal law. This Article II duty imposes two important requirements on the executive branch. The executive must not only

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<sup>102</sup> See BERGER, *supra* note 96, at 306-09 (arguing that the Take Care Clause requires the executive to enforce every law, unless it infringes on executive power); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 71-72 (5th rev. ed. 1984) (arguing that the President's "obligation to 'take care that the laws be faithfully executed'" requires him to enforce every "duly enacted" statute); CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE* 143-49, 153-54 (1998) (urging that the executive must enforce even allegedly unconstitutional statutes "except perhaps under extraordinarily limited circumstances"); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) ("[O]nce a bill has passed through all the constitutional forms of enactment . . . the President has no option under article II but to enforce the measure faithfully."); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 398 (1987) ("Once Congress enacts a statute . . . the President is duty bound to enforce it . . .").

<sup>103</sup> CORWIN, *supra* note 102, at 72.

<sup>104</sup> See, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61, 89-91 (arguing for a limited nonenforcement power but also asserting that the executive should enforce some laws despite the President's constitutional concerns); Aziz Z. Huq, *Enforcing (but not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1072-78 (2012) (arguing that the executive should, at least presumptively, decline to enforce laws that interfere with executive power but enforce laws that infringe on individual rights); Johnsen, *supra* note 15, at 12-14 (asserting that presidents may decline to enforce some laws but should not "disregard laws routinely based solely on their own constitutional views").

appeal a decision striking down the law but also defend that law in federal court.

### 1. Executive Standing and the “Duty to Defend”

Scholars have often overlooked the fact that the executive’s enforcement obligation carries with it a duty to defend.<sup>105</sup> But this point follows from the fact that the executive has standing to file suit and appeal—not on its own behalf but as the representative of the United States. The *government’s* interest is the continued enforceability of its law against third parties; the executive need not go through the judiciary to protect any other interest. Accordingly, as the representative of the government, the only relief that the executive may seek from the judiciary is a decision upholding the federal law.

Notably, contrary to the suggestion of some commentators, this “duty to defend” does not come from Article III.<sup>106</sup> For example, in *Windsor*, Justice Scalia argued that the Court lacked Article III jurisdiction over the executive’s appeal, because its agreement with the plaintiff’s constitutional challenge deprived the case of the requisite Article III “adverseness.”<sup>107</sup> Although there may be some sort of adversity requirement in Article III,<sup>108</sup>

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<sup>105</sup> See, e.g., Gressman, *supra* note 102, at 383-84 & n.17 (asserting that although the executive must enforce every federal law, “the Executive can refuse to defend” a statute in court); *infra* Section IV.A (discussing scholarship that likewise treats enforcement as separate from defense). I have found only one article advocating, on constitutional grounds, a strong “duty to defend.” See Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 72 (1979) (“Execution means enforcement and defense . . .”).

<sup>106</sup> See Miller & Bowman, *supra* note 105, at 74-75 (arguing that when the executive branch agrees with the private party, there is “a breakdown of the adversary system” and doubting that such a suit qualifies as an “article III case or controversy”).

<sup>107</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2700-01 (2013) (Scalia, J., dissenting) (“Article III requires not just a plaintiff (or appellant) who has standing to complain but an *opposing party* . . . . The question here . . . is whether there is any controversy (which requires *contradiction*) between the United States and Ms. Windsor. There is not.”).

<sup>108</sup> For a powerful argument that Article III requires at least some adverseness between the parties, see Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 546-48, 563-88 (2006). The cases discussed here satisfy any such adverseness requirement because the executive’s enforcement of the law harms the private party. For example, in *INS v. Chadha*, the executive threatened to deport Jagdish Chadha pursuant to a one-house legislative veto. 462 U.S. 919, 923-28 (1983). Notably, James Pfander and Daniel Birk have recently offered a strong historical argument that Article III does not require “adverse parties” in all cases. See generally James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. (forthcoming 2015), available at <http://ssrn.com/id=2424511> (contending that the Article III judicial power extends to both “contentious” and “non-contentious” jurisdiction and that the latter set of cases has no adversity requirement).

any such requirement should not extend to the legal arguments that the parties make in their briefs and other filings with the court. Otherwise, a defendant could defeat a plaintiff's case simply by not mounting any defense. But as Henry Monaghan has pointed out, it is well established that Article III courts have the power to issue default judgments against defendants who fail to appear, as well as the power to decide other cases in which the parties do not dispute the legal contentions of the other side.<sup>109</sup>

Such an "adverse legal argument" requirement would be particularly problematic in government litigation. *INS v. Chadha*<sup>110</sup> nicely illustrates this point. *Chadha* involved the pending deportation of an undocumented immigrant, Jagdish Chadha.<sup>111</sup> The Attorney General had decided to suspend Chadha's deportation and allow him to remain in the country, but the House of Representatives (through the one-house legislative veto) overruled that decision and directed that he be deported.<sup>112</sup> When Chadha sought review in the Ninth Circuit, the executive joined him in urging the court to strike down the statute authorizing the legislative veto.<sup>113</sup>

Appearing as amicus curiae,<sup>114</sup> counsel for the House of Representatives argued that the court of appeals lacked jurisdiction because there was no adversity between the parties.<sup>115</sup> The Ninth Circuit, however, found that the parties were "adverse" in an important sense: the executive branch planned to enforce the House's order and deport Chadha.<sup>116</sup> The court rejected the claim that the executive's legal position could prevent Chadha from seeking Article III court review of that decision. The court emphasized that if it "dismissed the appeal for lack of adversity, we would implicitly approve the

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<sup>109</sup> See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1373-74 (1973) (arguing that the need for "an adversary presentation" of the legal issues "hardly seems to be one of constitutional dimension," as evident from "default judgments, guilty pleas, . . . [and] naturalization . . . proceedings"); see also *In re Metro. Ry. Receivership*, 208 U.S. 90, 108 (1908) ("Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then . . . the Federal court might be without jurisdiction . . . whenever a judgment was entered by default."). Notably, the *Windsor* Court likewise appeared to conclude that the need for "adverse" legal arguments was at most a prudential requirement. See *infra* note 163.

<sup>110</sup> 462 U.S. 919 (1983).

<sup>111</sup> *Id.* at 922-23.

<sup>112</sup> *Id.* at 925-28.

<sup>113</sup> See *Chadha v. INS*, 634 F.2d 408, 411 (9th Cir. 1980).

<sup>114</sup> The House and the Senate initially appeared in *Chadha* as amici curiae. *Id.* They intervened after the court of appeals invalidated the legislative veto. *Chadha*, 462 U.S. at 930 n.5.

<sup>115</sup> *Chadha*, 634 F.2d at 419.

<sup>116</sup> *Id.*

untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional."<sup>117</sup>

The executive's duty to defend does not stem from Article III but from the powers and duties conferred by Article II. If the executive has an Article II duty to enforce a law, then it must assert in court the federal government's interest in the continued enforceability of that law. Indeed, absent a duty to defend, the executive would in no meaningful sense be enforcing (or promoting the enforcement of) that federal law.

## 2. No Standing to Seek a Supreme Court Settlement

The above analysis suggests why the executive lacks standing to appeal in nondefense cases. In each of the cases discussed below, the lower court (at the executive's behest) struck down the relevant federal law or otherwise ruled in favor of the plaintiff. On appeal, the executive asserted that it was "aggrieved" because the lower court decision prevented it from enforcing a federal law. Accordingly, the executive alleged that it had standing to assert the federal government's interest in the continued enforceability of the law. But that is not the interest that the executive sought to protect on appeal. The executive did not ask the appellate courts to uphold the law but instead urged them to strike it down. It appears that the executive's primary goal was not to protect the government's interests, but instead to obtain a higher court resolution of a contentious constitutional question.

*United States v. Lovett*<sup>118</sup> involved an appropriations rider that barred the executive branch from paying (and thus effectively fired) three named federal officials who were believed to have ties to communist organizations.<sup>119</sup> When the employees filed suit in the Court of Claims to challenge their termination and recover their unpaid salaries, the Roosevelt Administration joined them in arguing that the rider was unconstitutional.<sup>120</sup> The executive asserted that the measure was not only a bill of attainder but also an infringement of the President's Article II removal power because Congress had itself terminated three executive officials without impeaching

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<sup>117</sup> *Id.* at 420; *see also id.* ("Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal . . .").

<sup>118</sup> 328 U.S. 303 (1946).

<sup>119</sup> *See* Urgent Deficiency Appropriation Act, § 304, Pub. L. No. 78-132, 57 Stat. 431, 450 (1943) ("No part of any appropriation . . . shall be used, after November 15, 1943, to pay any part of the salary . . . of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett . . ."); *Lovett*, 328 U.S. at 308 (noting the House of Representatives' concern at that time about "subversives" in the government).

<sup>120</sup> *Lovett v. United States*, 66 F. Supp. 142, 143 (Ct. Cl. 1945).

them.<sup>121</sup> A Special Counsel appointed by the House of Representatives appeared as amicus curiae to defend the law.<sup>122</sup> The Court of Claims later issued a judgment in favor of the plaintiffs but did so without clearly ruling on the constitutional issues.<sup>123</sup>

The Solicitor General then filed a certiorari petition, asserting that the Court should grant review to determine the “liability of the United States” to the three employees.<sup>124</sup> But the Solicitor General also informed the Justices that the executive was “still of the view that the [rider] is unconstitutional” and urged the Court to strike it down.<sup>125</sup> Accordingly, the executive’s goal in seeking Supreme Court review was not to enforce the rider and avoid paying the employees (who, in the executive’s view, deserved their salaries).<sup>126</sup> Instead, as John Hart Ely suggested, the executive likely “wanted Supreme Court review” to secure “a judicial halt . . . to legislative tampering with the removal power.”<sup>127</sup> If so, the Supreme Court ultimately gave the executive only a partial victory. The Court granted review and held the rider unconstitutional but did so on bill of attainder grounds without commenting on the removal question.<sup>128</sup>

*INS v. Chadha*<sup>129</sup> grew out of a long-running dispute between the executive and legislative branches over the legislative veto.<sup>130</sup> Although Congress

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<sup>121</sup> See John Hart Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 11-17 (1975) (discussing the plaintiffs’ and the executive’s “[l]ines of [a]ttack”).

<sup>122</sup> *Lovett*, 66 F. Supp. at 143-44; see also 89 CONG. REC. 10,882 (1943) (authorizing the appointment of a Special Counsel).

<sup>123</sup> See *Lovett*, 66 F. Supp. at 148 (“We do not decide [whether the rider is constitutional] . . . . The plaintiffs are entitled to recover in either event.”).

<sup>124</sup> See Petition for Writs of Certiorari to the Court of Claims at 9, *Lovett*, 328 U.S. 303 (No. 809) (“Although this Department is still of the view that the [rider] is unconstitutional, we . . . file this petition for certiorari so that the question as to the liability of the United States may be brought to this Court.”), in 44 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 3, 13 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

<sup>125</sup> *Id.*

<sup>126</sup> Indeed, the executive initially considered ignoring the rider—and allowing the employees to remain at their jobs—but ultimately decided that enforcement was the “most direct way” to “force a constitutional adjudication.” Ely, *supra* note 121, at 4-5.

<sup>127</sup> *Id.* at 21-22. The Solicitor General’s petition for certiorari supports this account. See Petition for Writs of Certiorari, *supra* note 124, at 8-9 (asserting that “the opinion of the court’ below was in error in holding that [the rider] had not terminated the respondents’ services but had merely prohibited the disbursing agencies from paying their salaries,” and generally focusing on the removal issue).

<sup>128</sup> *Lovett*, 328 U.S. at 315-16, 318.

<sup>129</sup> 462 U.S. 919 (1983).

began adding such provisions to legislation in the 1930s, the number of legislative vetoes skyrocketed in the 1970s.<sup>131</sup> Presidents Jimmy Carter and Ronald Reagan repeatedly objected to the provisions and even threatened to disregard some legislative vetoes of administrative action.<sup>132</sup> But the Presidents found that they could not get many bills through Congress without acquiescing in at least some legislative vetoes.<sup>133</sup> Therefore, the executive opted to fight the veto in the courts.<sup>134</sup>

According to political scientist Barbara Craig, the Department of Justice (DOJ) "viewed *Chadha* as a promising case for attacking the legislative veto."<sup>135</sup> Thus, when the Ninth Circuit struck down the measure as applied in deportation cases,<sup>136</sup> the executive sought further review in the Supreme Court. Both the Senate and the House of Representatives, who had appeared as amici curiae in the Ninth Circuit (and later intervened),<sup>137</sup> challenged the executive's standing to appeal a lower court decision with which it agreed.<sup>138</sup> The Solicitor General responded that the executive was sufficiently "aggrieved" for purposes of appeal, because the lower court had

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<sup>130</sup> See BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 36 (1988) (noting that presidents took "exception to legislative vetoes ever since their 'invention' in the early 1930s"); see also Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 281 ("Whatever constitutional misgivings presidents may have harbored about the legislative veto, they acquiesced because Congress insisted that it would delegate certain authorities only by attaching effective conditions of legislative control.").

<sup>131</sup> CRAIG, *supra* note 130, at 36 (noting the dramatic increase in the 1970s).

<sup>132</sup> See Legislative Vetoes: Message to the Congress, 1 PUB. PAPERS 1146, 1147, 1149 (June 21, 1978) (arguing that "legislative veto provisions are unconstitutional" and asserting that the Carter Administration would not consider them "legally binding"); Statement on Signing the Union Station Redevelopment Act of 1981, PUB. PAPERS 1207, 1207 (Dec. 29, 1981) (objecting to a legislative veto "on constitutional grounds" and stating that the Reagan Administration's Department of Transportation would not regard it as legally binding).

<sup>133</sup> See CRAIG, *supra* note 130, at 109, 129, 158 (stating that "confrontational tactics" ultimately proved "politically unrealistic or administratively unpalatable").

<sup>134</sup> The *Chadha* litigation began under President Carter and continued into the Reagan Administration.

<sup>135</sup> CRAIG, *supra* note 130, at 88.

<sup>136</sup> *Chadha v. INS*, 634 F.2d 408, 411, 435-36 (9th Cir. 1980).

<sup>137</sup> See *supra* note 114.

<sup>138</sup> See Motion of Appellee U.S. House of Representatives to Dismiss at 1, *INS v. Chadha*, 462 U.S. 919 (1983) (No. 80-1832) ("[T]he INS is one of the prevailing and non-aggrieved parties below . . . . The INS therefore has no standing to invoke this Court's appeal jurisdiction . . . ."); Motion of Appellee U.S. Senate to Dismiss at 1, *Chadha*, 462 U.S. 919 (No. 80-1832) (moving to dismiss the appeal "on the ground that it is brought by a party that prevailed in the court of appeals").

“order[ed] the Attorney General to ‘cease and desist from taking any steps to deport’” Chadha.<sup>139</sup> The Solicitor General further stated:

Because the constitutional question in this case involves a conflict between the Executive and Legislative Branches, it is particularly important that it be resolved by the Judicial Branch. Accordingly, the course that the INS chose to follow—to enforce the statute, in order to ensure a judicial resolution of the controversy . . . was not merely permissible under the circumstances, but was a responsible and wholly appropriate response [to the one-house veto].<sup>140</sup>

As Professor Craig observes, the executive’s goal in *Chadha* was not to protect the continued enforceability of the veto provision. Instead, the executive sought a “Supreme Court ‘stamp of approval’” of the Ninth Circuit decision invalidating the veto.<sup>141</sup> Indeed, “[e]ven more important . . . was the possibility that the Supreme Court might rule more broadly, thus calling many, if not all, of the other legislative veto provisions in laws into question.”<sup>142</sup> Ultimately the Court obliged, permitting the executive’s appeal and issuing a sweeping decision that effectively invalidated every legislative veto.<sup>143</sup>

*Windsor* involved a challenge to the Defense of Marriage Act, which prohibited the federal government from recognizing same-sex marriages for purposes of federal law.<sup>144</sup> President Obama declared his opposition to DOMA during the 2008 campaign and, once in office, urged Congress to repeal the law.<sup>145</sup> But Congress took little action in response to these requests.

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<sup>139</sup> Reply Brief for the Appellant at 3, *Chadha*, 462 U.S. 919 (No. 80-1832), 1981 WL 388501, at \*3; see also *id.* (“INS therefore is an ‘aggrieved party’ within the common sense meaning of the term: it is subject to an order of the court below prohibiting it from taking action that it otherwise would take . . .”).

<sup>140</sup> *Id.* at 14; see also *id.* at 6 (emphasizing that the executive was arguing “against the constitutionality of a statute that . . . infringe[d] upon the prerogatives of the Executive Branch”).

<sup>141</sup> CRAIG, *supra* note 130, at 167.

<sup>142</sup> *Id.*

<sup>143</sup> *Chadha*, 462 U.S. at 939-40, 953-54, 959; see also *id.* at 967 (White, J., dissenting) (“Today the Court not only invalidates [the veto provision] of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.’”).

<sup>144</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013); see also Defense of Marriage Act, 1 U.S.C. § 7 (2012) (defining “marriage” as “a legal union between one man and one woman”), *invalidated by Windsor*, 133 S. Ct. 2675.

<sup>145</sup> See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 126, 142 (2013).

Finally, in February 2011, Attorney General Eric Holder notified Congress that the executive branch would cease defending DOMA but would continue to enforce it “unless and until Congress repeals [the law] or the judicial branch renders a definitive verdict against the law’s constitutionality.”<sup>146</sup> “This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.”<sup>147</sup>

Despite the Attorney General’s assertion, however, the executive did not enforce DOMA in every case. For example, the executive opted not to apply the law in bankruptcy and some immigration proceedings.<sup>148</sup> But the executive did enforce the law in Edith Windsor’s case, requiring her to pay over \$360,000 in federal estate taxes that she would not have had to pay if the government had recognized her same-sex marriage.<sup>149</sup> Windsor brought suit in federal district court to challenge DOMA on equal protection grounds, seeking a declaration that DOMA was unconstitutional and a refund of the tax.<sup>150</sup> The executive branch joined Windsor in arguing that the law was unconstitutional and urged the district court to “grant Plaintiff’s motion for summary judgment.”<sup>151</sup>

After the lower courts ruled in Windsor’s favor,<sup>152</sup> the executive sought Supreme Court review. When the Court directed the parties to address the issue of executive standing,<sup>153</sup> the Solicitor General argued that the executive

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<sup>146</sup> Holder Letter, *supra* note 27.

<sup>147</sup> *Id.*

<sup>148</sup> See KLARMAN, *supra* note 145, at 161-62 (observing that the executive suspended the deportation of some individuals whose same-sex marriages were recognized by state law); Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple’s Bankruptcy Court DOMA Victory*, METRO WEEKLY: POLIGLOT (July 7, 2011), <http://www.metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html> (noting that the executive stopped enforcing DOMA in bankruptcy cases).

<sup>149</sup> *Windsor*, 133 S. Ct. at 2682-83.

<sup>150</sup> *Windsor v. United States*, 833 F. Supp. 2d 394, 397 (S.D.N.Y. 2012).

<sup>151</sup> Defendant United States’ Memorandum of Law in Response to Plaintiff’s Motion for Summary Judgment and Intervenor’s Motion to Dismiss at 28, *Windsor*, 833 F. Supp. 2d 394 (No. 10-8435), 2011 WL 3754396 (arguing that “DOMA fails heightened scrutiny, and this Court should . . . grant Plaintiff’s motion for summary judgment”).

<sup>152</sup> See *Windsor v. United States*, 699 F.3d 169, 185, 188 (2d Cir. 2012) (concluding that intermediate scrutiny applies to classifications based on sexual orientation and invalidating DOMA under that standard); *Windsor*, 833 F. Supp. 2d at 402 (holding that “DOMA’s section 3 does not pass constitutional muster,” even under rational basis scrutiny).

<sup>153</sup> See *Windsor*, 133 S. Ct. 786, 787 (2012) (directing the parties to address “[w]hether the Executive Branch’s agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction”), *granting cert. to* 699 F.3d 169. The Court also appointed Professor Vicki Jackson to argue, as amicus, that the Court lacked jurisdiction. *Windsor*, 133 S. Ct. 814, 814-15 (2012) (inviting Professor Jackson to “brief and argue this case, as *amicus curiae*, in support of the position[] that the Executive Branch’s agreement with the court below that DOMA is



had standing to assert an injury to the government.<sup>154</sup> “The United States may properly invoke this Court’s jurisdiction because the judgments of the courts below preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff.”<sup>155</sup>

The executive did not, however, seek Supreme Court review to protect the continued enforceability of DOMA or to avoid paying Edith Windsor. The Solicitor General said as much in his certiorari petitions, declaring that “[a]lthough the Executive Branch agrees with the court of appeals’ determination that Section 3 [of DOMA] is unconstitutional, we respectfully seek . . . review so that the question may be authoritatively decided by this Court.”<sup>156</sup> As in *Lovett* and *Chadha*, the executive wanted a “definitive judicial ruling that [the law was] unconstitutional.”<sup>157</sup> The Supreme Court obliged, granting the executive’s petition and holding that DOMA violated “basic due process and equal protection principles.”<sup>158</sup>

In the above cases, the executive appealed the lower court decisions, not to protect the federal government’s interests, but rather to obtain a

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unconstitutional deprives this Court of jurisdiction to decide this case, and that the Bipartisan Legal Advisory Group of the United States House of Representatives lacks Article III standing in this case.”); Brief for Court-Appointed *Amica Curiae* Addressing Jurisdiction at 5, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 315234, at \*5 (explaining that the Court “added the two jurisdictional questions, which *amica* was later invited to brief and argue”).

<sup>154</sup> See Brief for the United States on the Jurisdictional Questions at 6, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 683046, at \*6 (“The United States may properly invoke this Court’s jurisdiction because the judgments of the courts below preclude enforcement of a federal statute and require payment of federal Treasury funds to plaintiff. The United States thus satisfies . . . the Article III requirement that [an appealing party] be ‘injured,’ by a lower court’s decision.”).

<sup>155</sup> *Id.*

<sup>156</sup> Petition for a Writ of Certiorari at 12, *U.S. Dep’t of Health & Human Servs. v. Massachusetts*, 133 S. Ct. 2887 (2013) (No. 12-15), 2012 WL 2586937, at \*12; see also Petition for a Writ of Certiorari Before Judgment at 12, *Office of Pers. Mgmt v. Golinski*, 133 S. Ct. 2887 (2013) (No. 12-16), 2012 WL 2586938, at \*12 (asserting that “the question of [DOMA’s] constitutionality raises important questions of federal law that . . . should be[] settled by this Court.”); Petition for a Writ of Certiorari Before Judgment at 10, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2012 WL 3991414, at \*10 (urging the Court to grant certiorari for the reasons stated in the *U.S. Dep’t of Health & Human Servs.* and *Golinski* petitions).

<sup>157</sup> Petition for a Writ of Certiorari at 12, *U.S. Dep’t of Health & Human Servs.*, 133 S. Ct. 2887 (No. 12-15), 2012 WL 2586937, at \*12 (“[T]he President has instructed Executive departments and agencies to . . . enforce [DOMA] until there is a definitive judicial ruling that [it] is unconstitutional.”).

<sup>158</sup> *Windsor*, 133 S. Ct. at 2693, 2695-96. The Court held that DOMA violated these constitutional principles insofar as it prohibited the federal recognition of marriages that were valid under state law. *Id.*

Supreme Court resolution of a constitutional question. But neither the Take Care Clause nor any other constitutional provision gives the executive the power to ask for the Court's view on a legal question—a point made clear by the Justices' rejection of President George Washington's request for a legal opinion on his Neutrality Proclamation.<sup>159</sup> The executive lacks the Article II power—and thus lacks Article III standing—to invoke federal jurisdiction simply to request “a definitive verdict”<sup>160</sup> on the validity of a federal law.

The Supreme Court has entirely overlooked these Article II principles. The Court in *Chadha* and *Windsor* permitted the executive to seek further review because of the federal government's interest in the continued enforceability of its laws. (The Court in *Lovett* did not even question the executive's authority to appeal.) Thus, the *Chadha* Court emphasized that the executive planned to “comply with the House action ordering deportation of Chadha” and was “aggrieved” by the lower court decision preventing it from enforcing that order.<sup>161</sup> Likewise, the *Windsor* Court held that the “United States retains a stake sufficient to support Article III jurisdiction on appeal,” because the lower court judgment “orders the United States to pay money that it would not disburse but for the court's order.”<sup>162</sup> The Court

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<sup>159</sup> See Letter from John Jay et al., Justices of the Supreme Court, to George Washington, President of the United States (Aug. 8, 1793) (“The Lines of Separation drawn by the Constitution . . . afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments.”), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 755, 755 (Maeva Marcus ed., 1998). As the Justices suggested, their interpretation is reinforced by the Opinion Clause of Article II, which expressly authorizes the President to seek opinions from executive officials. See U.S. CONST. art. II, § 2, cl. 1 (“[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”). Akhil Amar has argued that this provision was designed to preclude the President from seeking the advice of the judiciary. See Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 655–56 (1996) (noting that “in the Opinion Clause, [the President] has no explicit right to demand reports from coordinate branches akin to his right to demand reports from ‘executive Departments.’”).

<sup>160</sup> Holder Letter, *supra* note 27.

<sup>161</sup> *INS v. Chadha*, 462 U.S. 919, 930–31 (1983). Like the parties, the Court focused on the executive's appellate jurisdiction under then-applicable statutes. *Id.* Although the *Chadha* Court's analysis did not emphasize Article III, as the *Windsor* Court observed, “the words of *Chadha* make clear its holding that the refusal of the Executive to provide the relief sought suffices to preserve a justiciable *dispute as required by Article III*.” 133 S. Ct. at 2686 (emphasis added).

<sup>162</sup> 133 S. Ct. at 2686; see also *id.* (“[T]he United States retains a stake sufficient to support Article III jurisdiction . . . . The judgment in question orders the United States to pay Windsor the refund she seeks . . . . The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with . . . DOMA . . . .”).

declared: “That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made . . . .”<sup>163</sup>

But the executive was not in those cases seeking to redress an injury to the government. If it had been, the executive would have had a duty not only to appeal but also to seek a Supreme Court ruling upholding the law. Instead, in each case, the executive wanted a Supreme Court resolution of a constitutional question. The executive, however, has no greater right than any other member of society to a Supreme Court stamp of approval.

### C. *The Normative Case for Limiting Executive Standing*

My argument for this restriction on executive standing rests primarily on the constitutional text and structure, as well as the doctrine recognizing executive standing only to represent the United States. But this constitutional restriction also has strong normative underpinnings. First, the denial of standing in nondefense cases would help protect the liberty of individuals subjected to judicial process by the executive. Second, and more fundamentally, this restriction on executive standing would also protect the federal judiciary by limiting the executive’s power to refer controversial constitutional questions to the courts.

At the outset, it is important to recognize that the executive’s approach in *Lovett*, *Chadha*, and *Windsor* accords with general executive policies concerning the enforcement and defense of federal law—as reflected in opinions issued by the Office of Legal Counsel (OLC).<sup>164</sup> Although the executive asserts that it has a duty to enforce and defend most federal laws, it also argues that the Take Care Clause does not require it to do so in every instance. The executive contends that it may decline to enforce or defend any law that, in its view, is clearly invalid or infringes on executive power.<sup>165</sup> Moreover, in determining whether to enforce (or continue enforcing) a law,

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<sup>163</sup> *Id.* Although the Court noted that the executive’s failure to defend DOMA “introduce[d] a complication,” the only complication was a possible lack of “adverseness” between the parties. *Id.* at 2685, 2687. The Court resolved this issue by declaring adverseness to be a prudential, rather than an Article III, requirement. *See id.* at 2687-88. Any “prudential concerns” were overcome by the presence of the House, which had defended DOMA. *See id.* (noting the House’s “sharp adversarial presentation of the issues”).

<sup>164</sup> The OLC provides advice to the executive branch “on all constitutional questions.” *About the Office*, U.S. DEPARTMENT OF JUST., OFF. OF LEGAL COUNS., <http://www.justice.gov/olc> (last visited Apr. 18, 2014).

<sup>165</sup> *See supra* note 88.

the executive has emphasized the importance of securing judicial—particularly Supreme Court—review.<sup>166</sup> An influential OLC memorandum states that “[t]he Supreme Court plays a special role in resolving disputes about the constitutionality of enactments.”<sup>167</sup> Accordingly, “the President may base his decision to comply (or decline to comply)” with a federal statute “in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.”<sup>168</sup>

Although the executive’s emphasis on judicial review may be surprising (given that it seems to *reduce* executive power), the executive has strong political and institutional incentives to facilitate judicial resolution of constitutional questions. As many political scientists have argued, the President is well positioned to use the federal judiciary to advance his constitutional vision.<sup>169</sup> The President not only plays a central role in selecting federal judges<sup>170</sup> but also “[t]hrough control over the Justice Department . . . can exercise significant influence over . . . what arguments are presented” to the courts.<sup>171</sup> Moreover, the President may find that when he faces a hostile or divided Congress, the judiciary is more receptive to his constitutional views.<sup>172</sup> *Chadha* and *Windsor* illustrate this point. Although Presidents Carter and Reagan fought the legislative veto in the political arena, they found that they could not defeat the powerful pro-veto forces in Congress absent judicial intervention. Likewise, although President

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<sup>166</sup> The DOJ has declared that the executive will enforce a law, even one that it views as unconstitutional, if such enforcement is the only way to secure judicial review. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201 (1994). Conversely, the executive will refuse to enforce a law (such as one infringing on executive power) if that is the only way to create a justiciable case. See *id.*; see also The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 57 (1980) (asserting that the executive can “best preserve our constitutional system by refusing to honor” a limitation on presidential power if that is the only way to ensure judicial review).

<sup>167</sup> 18 Op. O.L.C. at 200.

<sup>168</sup> *Id.* at 201.

<sup>169</sup> See, e.g., KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 5 (2007) (“Through much of American history, presidents have found it in their interest to defer to the Court and encourage it to take an active role in defining the Constitution and resolving constitutional controversies.”); *infra* notes 170–72 and accompanying text.

<sup>170</sup> See U.S. CONST. art. II, § 2, cl. 2; see also SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997) (“[T]he placement of the power of judicial selection with the powers of the president [in Article II] rather than those of Congress suggests that the executive branch is a principal player in the appointment process.”).

<sup>171</sup> WHITTINGTON, *supra* note 169, at 196.

<sup>172</sup> See Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 102 (2009) (noting that the judiciary can be “a vital presidential ally against a recalcitrant Congress”).

Obama advocated the legislative repeal of DOMA, he had far more success when he took the matter to the courts.

The political and institutional interests of the executive branch also explain the emphasis on Supreme Court review. The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.<sup>173</sup> Thus, as former Solicitor General Drew Days put it, “[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law” and can have a substantial “impact upon the establishment of constitutional and other principles . . . .”<sup>174</sup> This institutional position gives the DOJ a strong incentive to seek Supreme Court resolution of constitutional questions.<sup>175</sup> Likewise, the President has a substantial interest in a Supreme Court ruling. Given our strong national culture of judicial supremacy, in which political actors and citizens defer to the Court’s constitutional views, a Supreme Court settlement of a constitutional question not only binds lower courts but also is likely to be seen as authoritative by Congress and future Presidents.<sup>176</sup>

These political and institutional interests help explain the executive branch’s appeals in *Lovett*, *Chadha*, and *Windsor*. The executive in each case

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<sup>173</sup> See 28 U.S.C. § 518(a) (2012) (charging the Attorney General and Solicitor General with litigating suits in the Supreme Court); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 93 (1994) (noting the “Solicitor General’s traditional role in conducting and controlling all Supreme Court litigation on behalf of the United States”).

<sup>174</sup> Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General’s Ethical Dilemma*, 22 NOVA L. REV. 677, 680 (1998).

In prior work, I argued that this institutional position gives the DOJ a strong incentive to oppose jurisdiction-stripping measures, particularly those aimed at the Supreme Court. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 260–66 (2012). Here, I emphasize the converse point: the DOJ has a strong incentive to seek Supreme Court review of constitutional questions—without regard to any limitations on executive standing.

<sup>176</sup> Notably, I do not seek to defend or endorse judicial supremacy as a normative matter. My point is only that, as a descriptive matter, there is in our society widespread deference to the Supreme Court on constitutional questions. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009) (arguing that the “American people have decided to cede . . . to the justices” the power to make determinations on constitutional questions); WHITTINGTON, *supra* note 169, at 5 (“Through much of American history, presidents have found it in their interest to defer to the Court. . . . The strategic calculations of political leaders lay the political foundation for judicial supremacy.”); Neal Devins, *The Majoritarian Rehnquist Court?*, LAW & CONTEMP. PROBS., Summer 2004, at 63, 70 (“Today’s Congress . . . rarely casts doubt on . . . the Court’s power to authoritatively interpret the Constitution.”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 147 (“[T]he modern Congress typically treats the Court as the exclusive authority over constitutional issues.”).

wanted not only a judicial resolution of the constitutional issue but a *Supreme Court settlement* of the issue. Thus, the Roosevelt Administration in *Lovett* sought (unsuccessfully) a “judicial halt . . . to legislative tampering with the removal power”;<sup>177</sup> the Carter and Reagan Administrations looked to the Court in *Chadha* to eliminate a political tool that had proven to be a thorn in the side of many Presidents; and the Obama Administration asked the Court to do what it had failed to do through the legislative process: repeal DOMA. In a world of judicial supremacy, a Supreme Court ruling is about as good as a repeal.

But it is important to keep in mind that, under the executive branch’s own construction of Article II, it does not need the Supreme Court to “halt” the enforcement of federal laws or, relatedly, to settle constitutional questions. The executive branch believes that it has the power to refuse to enforce a law that it views as clearly unconstitutional—as the executive did in each of these cases.<sup>178</sup> For this reason, even assuming (as seems likely) that the Take Care Clause imposes on the executive branch a duty to “faithfully execute” not only federal statutes but also the Constitution,<sup>179</sup> the executive can perform this duty without resort to an Article III court. As we have seen, in order to *enforce* federal law against third parties, consistent with due process requirements, the executive must often go through the courts. But the executive does not need judicial permission when it *declines to enforce* a law on constitutional grounds.<sup>180</sup> An executive

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<sup>177</sup> Ely, *supra* note 121, at 21.

<sup>178</sup> See *supra* note 88 and text accompanying note 165. The executive clearly could decline to enforce a federal law once a lower court ruled in favor of a private litigant. For example, the Roosevelt Administration could have paid the employees in *Lovett* as soon as the Court of Claims ruled in their favor. Moreover, precisely because of the targeted nature of the federal law in that case (it applied only to those three employees), such a result would have ensured its uniform enforcement. Thus, the Roosevelt Administration did not need Supreme Court review—even assuming that the executive lacks power to circumvent an appropriations statute. For a sample of the scholarly debate over this issue, compare Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1351 (1988) (“Even where the President believes that Congress has transgressed the Constitution . . . the President has no constitutional authority to draw funds from the Treasury . . .”), with J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1196-97 (arguing that the President may use “unappropriated spending” to carry out a “textually demonstrable duty or prerogative of the President under article II”).

<sup>179</sup> For purposes of this analysis, I assume that the term “Laws” in the Take Care Clause includes the U.S. Constitution (as well as treaties and federal common law). See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

<sup>180</sup> The OLC has acknowledged this point. See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 31-32, 35-36 (1992) (asserting that “[w]here an act of Congress conflicts with the Constitution . . . the President must heed and execute the Constitution” and that the President may “treat a statute as invalid prior to a judicial

refusal to enforce a law may lead to political repercussions but it does not create a due process problem. In short, the executive can “faithfully execute” the Constitution—by refusing to enforce an allegedly unconstitutional law—without the intervention of an Article III court.

Thus, for example, the Carter and Reagan Administrations could have ignored every legislative veto (as they threatened to do on occasion),<sup>181</sup> and the Obama Administration could have spared many people the negative effects of DOMA by refusing to enforce it in *every* case, beginning in February 2011.<sup>182</sup> But such open “confrontation” would have been politically costly.<sup>183</sup> Accordingly, the executive referred the constitutional question to the judiciary—not to protect the federal government’s interest in the continued enforceability of federal law, nor because that was the only means of enforcing the Constitution or ensuring a uniform settlement of federal law—but because it was politically more palatable to have the matter resolved by the courts. Article II does not, however, confer on the executive the power to invoke federal jurisdiction simply for political convenience.

Some readers may nevertheless argue that Article II *should* be construed to authorize executive standing in nondefense cases. The argument might be that, even if the executive *could* faithfully execute the Constitution by refusing to enforce a law, that should not be the executive’s only option. The executive should also be permitted to seek a Supreme Court ruling that adopts the executive’s constitutional position that the statute is invalid—as the executive sought to do in *Lovett*, *Chadha*, and *Windsor*. Indeed, precisely

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determination” because any other approach would suggest that “a statute conflicts with the Constitution *only* when the courts declare so”).

<sup>181</sup> See *supra* note 132 and accompanying text.

<sup>182</sup> The executive might have needed appropriated funds to pay health and other benefits to the same-sex spouses of federal employees. But as Aziz Huq has observed, given the breadth of appropriations statutes, it seems likely that the executive could have found funds to pay those individuals. See Huq, *supra* note 104, at 1026–27 (emphasizing that agencies typically have broad discretion in using their lump-sum appropriations).

<sup>183</sup> See CRAIG, *supra* note 130, at 109, 129 (discussing the political difficulties the Carter Administration faced in its opposition to the legislative veto). Such confrontation would be politically costly in part because it would distract from other presidential priorities. Moreover, many members of Congress may be opposed to the executive making unilateral decisions not to enforce federal laws—even when the members agree with the President’s view that a given law is unconstitutional. Notably, although Democrats in Congress supported the executive’s decision not to defend DOMA, they did not suggest that the President take the further step of refusing to enforce the law. See, e.g., 157 CONG. REC. S1754 (daily ed. Mar. 16, 2011) (statement of Sen. Leahy) (“I applaud President Obama and Attorney General Holder for making the right decision [in refusing to defend DOMA]. However, the administration is still enforcing DOMA elsewhere, because it is the law of the land. It is now time for leaders in Congress to change that law.”).

because of our strong national culture of judicial supremacy, such a Supreme Court ruling could be an effective way of “executing” the President’s preferred interpretation of the Constitution. Under this view, the executive may invoke the federal judicial power not only to protect the federal government’s interest in the continued enforceability of federal law, but also to “faithfully execute” what the executive views as the proper construction of the Constitution.

Importantly, the executive branch has not relied on such an argument to support standing; the executive, even in nondefense cases, has consistently claimed that it has standing only to assert the United States’ interest in the continued enforceability of its laws.<sup>184</sup> Nor has the Supreme Court upheld executive standing to execute the President’s view of the Constitution; the Court has permitted the executive to bring suit or appeal only on behalf of the federal government.<sup>185</sup>

But more fundamentally, taken to its logical conclusion, this argument would seem to remove all limits on executive power to refer constitutional questions to the federal judiciary. After all, the President might conclude that he could most “faithfully execute” the Constitution by simply asking the Supreme Court to declare invalid a law that (in the President’s view) is unconstitutional—before the executive enforces the law against anyone. In other words, a construction of the Take Care Clause sufficiently broad to authorize executive standing in nondefense cases would also seem to authorize the executive to seek advisory opinions.

The better reading is that the executive has standing *only* to perform Article II duties that it cannot perform except through the Article III courts. Under this view, the executive’s power is broad but not unlimited. The executive has standing to enforce and defend federal law because it often can protect the government’s interest in the continued enforceability of its laws only by taking a case to an Article III court. By contrast, the executive can “faithfully execute” the Constitution without resort to an Article III court; the executive can refuse to enforce what it views as an unconstitutional law. Although the executive branch may find it useful—and more politically palatable—to invoke federal jurisdiction to obtain a Supreme Court resolution of a constitutional question, the executive’s affirmative authority does not extend so far.

In fact, there are good reasons to deny executive standing to seek such a Supreme Court settlement. First, the denial of standing would help protect the individuals subjected to further judicial process by the executive’s appeal.

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<sup>184</sup> See *supra* subsection II.B.2.

<sup>185</sup> See *supra* Section I.A, subsection II.B.2.



Although there may be various interests at stake in a given nondefense case,<sup>186</sup> if one assumes, as I do throughout this Article, that standing doctrine rests in part on the “case” or “controversy” requirement of Article III,<sup>187</sup> one must consider the liberty of the individual (or individuals) involved in the particular case. As *Chadha* illustrates, these liberty interests can be substantial. When the executive appeals, the other party not only shoulders the burden of additional litigation, but also faces the risk that the Supreme Court will reverse the lower court ruling protecting that party’s constitutional rights. In *Chadha*, if the Supreme Court had upheld the legislative veto (as many scholars at the time believed it should),<sup>188</sup> then the executive branch *could have deported Chadha* pursuant to the one-house order, even though the executive itself viewed the deportation as both unwise and unconstitutional, and even though Chadha had obtained one federal court ruling in his favor.<sup>189</sup> Denying executive standing in nondefense cases would prevent the executive from imposing such costs on individuals solely to obtain a Supreme Court resolution of a constitutional question.

Second, and more fundamentally, restricting executive standing would protect the federal judiciary. Standing doctrine and other justiciability tests, such as the rule against advisory opinions, are designed in large measure to

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<sup>186</sup> For example, the executive may seek to protect third parties not before the court by obtaining a constitutional ruling against a federal statute. In *Windsor*, although the executive arguably harmed equality principles in the short term by enforcing DOMA, it sought to protect those interests in the long term by obtaining a definitive Supreme Court ruling that would likely prevent the enforcement of DOMA by any President. I do not deny the importance of those third-party interests. But I believe that standing doctrine serves to protect other interests—namely, those of the individual(s) involved in the case—by limiting the executive’s power to subject anyone to further judicial process solely to obtain a definitive Court ruling. Although some individuals may be willing participants in the litigation, the Supreme Court’s current view—that the executive may appeal in nondefense cases—does not depend on consent.

<sup>187</sup> See *supra* note 21 and accompanying text.

<sup>188</sup> See Bernard Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 (1978) (stating that, in the late 1970s, most scholars believed that the veto was constitutional). Furthermore, some lower courts had upheld the legislative veto. See, e.g., *Atkins v. United States*, 556 F.2d 1028, 1033, 1071 (Ct. Cl. 1977) (upholding the legislative veto in the Federal Salary Act of 1967, which permitted presidential recommendations for judicial salary increases to go into effect unless vetoed).

<sup>189</sup> The executive branch might ultimately have declined to enforce the one-house order. But in the litigation, the executive insisted that it would enforce the order, absent a judicial ruling directing otherwise. See *INS v. Chadha*, 462 U.S. 919, 939–40 (1983). Interestingly, there is another way Chadha might have escaped deportation. Chadha married an American citizen, so he might have been able to apply for permanent residency on that basis. See CRAIG, *supra* note 130, at 140. But according to the Ninth Circuit, there was no guarantee that Chadha would obtain residency through marriage. See *Chadha v. INS*, 634 F.2d 408, 417 n.6 (9th Cir. 1980).

protect the federal courts from becoming substitute fora for matters that could have been, but were not, resolved through the political process.<sup>190</sup> As John Ferejohn and Larry Kramer have stated, such rules help safeguard “the judiciary’s credibility and reputation” by ensuring that it does not become embroiled “in every important political or constitutional controversy.”<sup>191</sup> Nondefense cases raise this concern; the executive’s primary goal in appealing such cases is to refer controversial issues to the judiciary, particularly to the Supreme Court. Accordingly, the denial of executive standing in such cases would limit its capacity to call on the judiciary to settle legal questions.

Notably, this restriction on executive standing to appeal would likely protect not only the Supreme Court but the entire federal judiciary. As discussed, the executive has strong political and institutional incentives to ensure that constitutional issues receive not merely judicial review but Supreme Court settlement.<sup>192</sup> The executive is thus unlikely to adopt a policy that would allow major constitutional questions to end at the district court level. The executive either would refuse to enforce a law that it viewed as unconstitutional (thereby preventing the issue from going to a federal district court), or it would ensure that it had standing to seek Supreme Court review—by defending the law on behalf of the United States. For these reasons, contrary to the assertion of some commentators,<sup>193</sup> restricting executive standing should not interfere with the Supreme Court’s role in supervising the lower courts.<sup>194</sup>

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<sup>190</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982) (“Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of ‘standing’ would be quite unnecessary.”).

<sup>191</sup> John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1003-07 (2002).

<sup>192</sup> See *supra* notes 173-76 and accompanying text.

<sup>193</sup> See, e.g., Ryan W. Scott, *Standing to Appeal and Executive Non-Defense of Federal Law After the Marriage Cases*, 89 IND. L.J. 67, 87-88 (2014) (arguing that the standing ruling in *Windsor* was needed to ensure that the Court could provide “clear guidance to lower courts”).

<sup>194</sup> See *infra* Section IV.B (discussing further the executive’s incentives to secure Supreme Court review). For discussions of the Court’s “supervisory” role, see generally JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* (2009); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 685-707 (2012) (discussing the Court’s efforts to “superintend law declaration by other courts”). See also Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 9 (2009) (noting that the Court has long been viewed as having “a leading role in defining the content of federal law for the judiciary”).

Finally, it is important to recall that, absent standing to appeal in non-defense cases, the executive could still advance its constitutional position through the political process by, for example, seeking repeal of or refusing to enforce a law that the President viewed as invalid. It seems reasonable to require the President to go through that political route, rather than through the judiciary. As the Supreme Court stated in *United States v. Richardson* in discussing private-party standing:

[T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen who is not satisfied with the “ground rules” established by the Congress . . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls.<sup>195</sup>

Whether or not the Court properly applies this principle to private parties,<sup>196</sup> surely this message should apply to the President and other executive officials, who have far greater access to the political process than any private citizen. When the executive is “not satisfied with the ‘ground rules’ established by the Congress,” it has a “right to assert [its] views in the political forum.”<sup>197</sup> The executive branch does not have an unqualified right to seek from the “judicial branch . . . a definitive verdict against [a] law’s constitutionality.”<sup>198</sup>

### III. CONGRESS’S (LACK OF) STANDING UNDER ARTICLE I

Many scholars have suggested that Congress should be permitted to represent the federal government, at least in defense of federal law, when the executive branch is derelict in its duties. But these commentators have largely overlooked the fact that, like the executive branch, Congress must have affirmative constitutional authority to invoke federal jurisdiction. The power of Congress to bring suit or appeal in federal court does not come

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<sup>195</sup> 418 U.S. 166, 179 (1974).

<sup>196</sup> Some scholars have criticized the Supreme Court’s standing doctrine on the ground that it relegates the wrong citizens to the political process. See, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 486-88 (2008) (suggesting that the Court’s standing jurisprudence “tends to admit those who already have access to the political system, and reject those who lack such access”). I do not seek to enter that debate. My argument here is that the *Richardson* rationale *should* apply to the executive branch because it clearly does have access to the political process.

<sup>197</sup> *Richardson*, 418 U.S. at 179.

<sup>198</sup> Holder Letter, *supra* note 27.

from Article III. Instead, the scope and limits of congressional standing necessarily depend on a construction of the provisions conferring power on Congress—principally, those in Article I.<sup>199</sup> I argue that the Constitution does not confer on Congress (or the House or the Senate) the power to enforce or defend federal law. Congress should not be permitted to exercise the discretion that necessarily accompanies standing to represent the United States in court.

### A. *The Structural Case Against Legislative Standing*

There is currently no “congressional counsel.”<sup>200</sup> In the 1970s, the House of Representatives established an Office of General Counsel, which “provid[es] legal assistance and representation to the House.”<sup>201</sup> In 1978, Congress also created an Office of Senate Legal Counsel,<sup>202</sup> which has the authority to participate in litigation “in the name of the Senate” or its subdivisions.<sup>203</sup> Congress does not, however, appear to have granted standing to either the House or the Senate to represent the United States.

That may explain why in *Windsor* no Justice considered whether the House, which sought to defend DOMA, had standing to assert the government’s interest in the continued enforceability of that federal law. Although the majority opted not to rule on the House’s standing,<sup>204</sup> Justices Alito and Scalia debated whether the House had “Article III standing” to appeal the

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<sup>199</sup> See U.S. CONST. art. I; *infra* note 215 and accompanying text.

<sup>200</sup> For a discussion of the development of the House and Senate counsel (and the failed effort to create a congressional counsel), see generally Grove & Devins, *supra* note 12.

<sup>201</sup> Rules of the House of Representatives, R. II(8), 113th Cong. (2013), available at <http://clerk.house.gov/legislative/house-rules.pdf>; see also *id.* (“There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. . . . [The counsel] shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leadership.”).

<sup>202</sup> See Ethics in Government Act of 1978, §§ 701–717, Pub. L. No. 95-521, 92 Stat. 1824, 1875-85 (1978) (codified as amended at 2 U.S.C. §§ 288–288n (2012)).

<sup>203</sup> 2 U.S.C. § 288e(a) (2012) (“When directed to do so [by Senate resolution], the Counsel shall intervene or appear as amicus curiae in the name of the Senate, or in the name of an officer, committee, [or] subcommittee . . . of the Senate in any legal action . . . in which the powers and responsibilities of Congress . . . are placed in issue.”). Notably, the statute reflects Congress’s own assumption that the Senate’s standing depends only upon Article III. See *id.* (“The Counsel shall be authorized to intervene only if standing to intervene exists under . . . article III of the Constitution of the United States.”).

<sup>204</sup> The Court decided that such a ruling was unnecessary, since it concluded (incorrectly, in my view) that the executive had standing to seek Supreme Court review. *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013).

lower court decision striking down DOMA.<sup>205</sup> Justice Alito insisted that the House did have standing, reasoning that the lower court decision “im-pair[ed] Congress’ legislative power” and thereby “injured” the House,<sup>206</sup> while Justice Scalia, in turn, denied that the House could assert such an “institutional injury.”<sup>207</sup> Thus, the Justices debated the House’s standing to protect its institutional interests, rather than the well-recognized interests of the federal government.

It is doubtful that Congress would have standing to assert an “institutional injury” arising out of the invalidation of a federal statute. As we have seen, the Supreme Court has never allowed the executive branch to assert such an injury and strongly suggested in *Raines v. Byrd* that neither the executive nor the legislature may assert an “institutional” interest in the constitutionality of a law.<sup>208</sup> For now, however, I bracket the issue of what types of “institutional injuries” might be judicially cognizable<sup>209</sup> (as well as

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<sup>205</sup> See *id.* at 2712 n.1 (Alito, J., dissenting) (“Our precedents make clear that . . . BLAG must demonstrate that it had Article III standing [to appeal].”). “BLAG” is the Bipartisan Legal Advisory Group, which directs the House counsel’s actions. See *supra* note 201.

<sup>206</sup> See *Windsor*, 133 S. Ct. at 2711-14 (Alito, J., dissenting) (asserting that “because legislating is Congress’ central function, any impairment of that function is a . . . grievous injury,” and that “in the narrow category of cases in which a court strikes down an Act of Congress and the Executive declines to defend the Act, Congress . . . has standing to defend the undefended statute”).

<sup>207</sup> See *id.* at 2703-04 (Scalia, J., dissenting) (contending that the “impairment of a branch’s powers alone” does not “confer[] standing”).

<sup>208</sup> 521 U.S. 811, 814, 821, 829-30 (1997) (holding that six legislators lacked standing to assert an “institutional injury” caused by the Line-Item Veto Act). Significantly, the Court in *Raines* “attach[ed] some importance to the fact that [the legislators were] not . . . authorized to represent their respective Houses of Congress in th[e] action, and indeed both Houses actively oppose[d] their suit.” *Id.* at 829-30. But the Court expressly declined to decide whether the legislators could have brought the challenge with their chambers’ support. *Id.* At a minimum, the Court’s reasoning casts doubt on claims of “institutional injury.”

<sup>209</sup> There may be some institutional interests that can only be enforced through the judiciary, such as the (long recognized) power of the House and the Senate to subpoena witnesses in connection with congressional investigations and to go to court to enforce those subpoenas. As Neal Devins and I have detailed in separate work, the power of the House and Senate to enforce subpoenas (and other internal rules) is the *only* “enforcement power” that the Constitution confers on any part of Congress. See Grove & Devins, *supra* note 12, at 573-74. This power stems from the constitutional provision authorizing each chamber to establish and enforce the “Rules of its Proceedings.” U.S. CONST. art. I, § 5, cl. 2. Each chamber has long used this power to investigate wrongdoing by the executive and others, to subpoena documents and testimony in connection with those investigations, and to hold third parties in “contempt” if they fail to comply with a subpoena. See Grove & Devins, *supra* note 12, at 574-75. To make this constitutional power effective, the House and the Senate must at times invoke federal jurisdiction to enforce subpoenas against third parties. Federal courts thus have good reason to uphold standing in such cases. See *id.*

any concerns about the statutory authority of the House or Senate counsel) and consider the question scholars have raised: whether Congress *could* create some kind of “congressional counsel” with standing to represent the federal government in court.<sup>210</sup>

As we have seen, Article III clearly grants the federal courts jurisdiction over cases and controversies involving the “United States.”<sup>211</sup> Moreover, the Supreme Court has recognized that the United States has judicially cognizable interests in the enforcement and continued enforceability of its laws.<sup>212</sup> One could envision a constitutional scheme under which various institutions, including the legislature, might be authorized to represent the government’s sovereign interests in court; indeed, the Supreme Court has found that, under the laws of some states, “legislators have standing to contest a decision holding a state statute unconstitutional.”<sup>213</sup> I argue, however, that the federal Constitution does not confer such authority on Congress or its components.<sup>214</sup>

No provision of the Constitution appears to give Congress the power to bring suit to enforce or defend federal statutes.<sup>215</sup> Instead, the Constitution

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at 627-28; *see also* Comm. on Oversight & Gov’t Reform v. Holder, No. 12-1332, 2013 WL 5428834, at \*16-17 (D.D.C. Sept. 30, 2013) (upholding a House committee’s standing to enforce a subpoena against the Attorney General); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 68-69 (D.D.C. 2008) (concluding that “the House has standing to invoke the federal judicial power to aid its investigative function”). It is not clear whether an analogous argument could be made for the executive—that is, whether there are any “institutional interests” that the executive could vindicate only through the courts.

<sup>210</sup> *See, e.g.*, Gorod, *supra* note 16, at 1248 (arguing that Congress has standing to defend statutes on behalf of the United States); Greene, *supra* note 16, at 596 (“Congress could pass a statute authorizing the Senate or House Counsel, or counsel representing both houses jointly, to litigate . . . on behalf of the United States . . .”).

<sup>211</sup> *See* U.S. CONST. art. III, § 2, cl. 1.

<sup>212</sup> *See supra* Sections I.B–C.

<sup>213</sup> *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (“We have recognized that state legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State’s interests.” (citing *Karcher v. May*, 484 U.S. 72, 82 (1987))).

<sup>214</sup> Notably, I assert that a prohibition on congressional standing can be inferred from specific provisions of the Constitution: the provisions enumerating the mechanisms by which Congress may influence law implementation—statutory enactment, the impeachment of federal officers, and the Senate’s role in appointments. I thereby rely on a well-established interpretive canon: *expressio unius est exclusio alterius* (the express mention of one thing excludes others). *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-29 (1992) (discussing this canon). I do not assert that congressional standing simply violates general separation of powers principles. For a powerful critique of such theories, *see* Manning, *supra* note 13, at 144 (arguing that “the Constitution adopts *no freestanding principle of separation of powers*” that should be judicially enforced).

<sup>215</sup> Congress’s power is defined primarily by Article I. But other provisions of the Constitution also confer power on Congress. *See, e.g.*, U.S. CONST. art. IV, § 3, cl. 2 (empowering

carefully separates the enactment of federal law from its execution,<sup>216</sup> specifying only three respects in which any part of Congress may play a role in law implementation. First, the Senate has the power to confirm (or reject) high-ranking executive officers nominated by the President.<sup>217</sup> Second, Congress may specify the duties of executive officials through laws enacted via bicameralism and presentment.<sup>218</sup> Finally, Congress has the power to remove executive officers through impeachment.<sup>219</sup> Congress may not, however, confer upon itself the power to execute federal law.

The Supreme Court has “strictly enforced” this structural principle separating law enactment from implementation.<sup>220</sup> For example, in *Bowsher v. Synar* and *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, the Court emphasized that “agents of Congress” may not exercise executive or administrative functions.<sup>221</sup> Nor may Congress control those implementing federal law—outside the appointment, statutory, and removal mechanisms specified in the Constitution. In *Buckley v. Valeo*, the Court held that Congress may not “vest in itself, or in its

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Congress to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property” of the United States); U.S. CONST. amend. XIII, § 2, amend. XIV, § 5, amend. XV, § 2 (together conferring on Congress the “power to enforce . . . by appropriate legislation” the Reconstruction Amendments). These provisions all appear to give Congress additional legislative power. None seems to give Congress any direct role in executing federal law (through litigation or otherwise).

<sup>216</sup> This strict separation of legislative and executive powers was a reaction to negative experiences with the constitutional structures of Britain, the state governments, and the Articles of Confederation. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1717 (2012); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1273 (2006).

<sup>217</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>218</sup> See *id.* art. I, § 7, cl. 2.

<sup>219</sup> *Id.* art. I, § 2, cl. 5 & § 3, cl. 6.

<sup>220</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 648–49 (1996) (observing that the Court has “strictly enforced the principle that Congress cannot directly participate in the implementation of Congress’s own laws”); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 114–15 (1994) (noting similarly that the Court consistently invalidates statutes in which “Congress attempted to give itself a degree of ongoing authority over the administration of the laws”).

<sup>221</sup> See *Bowsher*, 478 U.S. 714, 736 (1986) (invalidating the Balanced Budget and Emergency Deficit Control Act of 1985 insofar as it granted the Comptroller General, an agent of Congress, executive functions); *Metro. Washington Airports Auth.*, 501 U.S. 252, 255, 276 (1991) (invalidating a statute that gave a “Board of Review” staffed by members of Congress “veto power” over certain administrative decisions and stating that “[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it”).

officers, the authority to appoint officers of the United States”<sup>222</sup> and thus invalidated provisions of the Federal Election Campaign Act that permitted members of Congress to select FEC commissioners.<sup>223</sup> In *Chadha*, the Court struck down the one-house legislative veto, concluding that Congress may direct the executive’s implementation of federal law only through statutes enacted via bicameralism and presentment.<sup>224</sup> And, in *Bowsher*, the Court concluded that impeachment was the exclusive mechanism by which Congress could remove executive officials, stating that “[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws.”<sup>225</sup>

The Court has also made clear that Congress may not rely on its authority under the Necessary and Proper Clause to transfer executive powers to itself.<sup>226</sup> For example, in *Bowsher*, the Court declined to defer to “Congress’ judgment that the delegation” of executive functions to an agent of Congress was “‘necessary and proper’ to the exercise of the powers granted the Federal Government by the Constitution.”<sup>227</sup> The Court declared: “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”<sup>228</sup> “The structure of the Constitution does not permit Congress to execute the laws . . . .”<sup>229</sup>

The enforcement and defense of federal statutes are key components of the execution of federal law. That is why the executive branch has standing to assert the federal government’s interests in court. As we have seen, in order to faithfully execute federal law consistent with due process principles, the executive often must bring criminal and civil enforcement actions against alleged violators. The executive also has an obligation to defend most—if not all—federal laws to ensure their continued enforceability. Congress, by contrast, has no constitutional license analogous to the Take

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<sup>222</sup> 424 U.S. 1, 135 (1976).

<sup>223</sup> See *id.* at 109-13, 143-44.

<sup>224</sup> See *INS v. Chadha*, 462 U.S. 919, 953-54, 959 (1983).

<sup>225</sup> 478 U.S. at 722-23, 736.

<sup>226</sup> See, e.g., *Buckley*, 424 U.S. at 134-35, 138-39 (holding that congressional appointment of executive officials could not be justified as a “necessary” and “proper” means of regulating federal elections because “Congress’ power under [the Necessary and Proper] Clause is inevitably bounded by the express language” of the Appointments Clause).

<sup>227</sup> The dissenting opinion urged such deference. *Bowsher*, 478 U.S. at 776 (White, J., dissenting); see also *id.* (“The Act vesting budget-cutting authority in the Comptroller General represents Congress’ judgment that the delegation of such authority . . . is ‘necessary and proper’ . . . and the President’s approval of the statute signifies his unwillingness to reject the choice made by Congress.”).

<sup>228</sup> 478 U.S. at 736 (majority opinion) (quoting *Chadha*, 462 U.S. at 944).

<sup>229</sup> *Id.* at 726.



Care Clause that empowers it to enforce or defend federal statutory commands in court. Accordingly, there is no basis for such congressional standing.

Some readers may object to my treatment of enforcement and defense as two sides of the same coin, which both form part of law “execution.” In fact, a few scholars have recently asserted that the defense of federal statutes is *not* an executive function—or at least that it is not a sufficiently “core” executive function as to preclude the involvement of Congress.<sup>230</sup> Under this view, even if Congress lacks the Article I power to *enforce* laws through criminal or civil actions, it may still *defend* those laws in court. Thus, Brianne Gorod writes, “Defending [a] law . . . does not focus on the operation of the law and generally will not affect its operation at all. . . . [T]he Executive simply provides the court with its understanding of what the Constitution requires and . . . why the law at issue is consistent with it.”<sup>231</sup> Accordingly, when the executive declines to defend a law, “someone else can explain to the court why the statute should be upheld.”<sup>232</sup>

Regardless of whether one can analytically separate “defense” from “execution” for some purposes, such an argument is insufficient in the context of legislative *standing*. Standing is not simply the privilege to go to court and make legal arguments. That role can be performed by amici curiae once a case is already before a court. Standing is the authority to invoke a court’s jurisdiction and thereby subject others to judicial process, at trial or on appeal.

Furthermore, this argument overlooks why the executive branch itself has standing to defend federal laws and thus to appeal decisions invalidating those laws. The executive branch does not have standing merely to offer its views on a constitutional question or to seek a Supreme Court resolution of the question. The executive has standing because, absent an appeal, the law can no longer be enforced against (at least) the parties to that case. Thus, the executive had standing in *Gonzales v. Raich* to protect the continued enforceability of the Controlled Substances Act in cases involving

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<sup>230</sup> See Gorod, *supra* note 16, at 1248 (arguing that “defending a law in court” is not “the same as executing the law”); see also Greene, *supra* note 16, at 591-92 (asserting that, in cases of executive nonenforcement, if Congress brings suit against the executive to obtain a declaratory judgment on the constitutionality of a law, Congress is not “controlling the execution of law”). Justice Alito seemed to make a similar assumption in *Windsor*. See *infra* note 238.

<sup>231</sup> Gorod, *supra* note 16, at 1219-20.

<sup>232</sup> *Id.* at 1220-21; see also *id.* (noting that “the law remains in operation” as long as the executive continues to enforce it).

homegrown marijuana.<sup>233</sup> Likewise, in the state sovereign immunity cases, the executive intervened to protect the power of private citizens to enforce federal statutory commands against unconsenting states.<sup>234</sup> In sum, the executive has standing because it generally has an Article II power and duty to protect the federal government's interests in the enforcement and continued enforceability of federal law.

Accordingly, for Congress to have similar standing to defend federal law, it must also have affirmative authority to assert the federal government's interest in the continued enforceability of its laws. But no provision of Article I or any other part of the Constitution appears to give Congress any such affirmative authority. On the contrary, the constitutional text and structure seem to preclude Congress from playing *any* direct role in law execution.

The Supreme Court overlooked these structural concerns entirely in *Chadha*, when it permitted the House and Senate counsel to intervene to defend the statute authorizing the legislative veto.<sup>235</sup> Significantly, the *Chadha* Court did *not* hold that the House or the Senate had Article III standing to appeal the Ninth Circuit decision invalidating the law—either on behalf of the federal government or otherwise.<sup>236</sup> The Court did not need to address that issue because it held (incorrectly, in my view) that the executive could appeal the lower court ruling.<sup>237</sup>

But some scholars and jurists, including Justice Alito in *Windsor*, have construed *Chadha* to permit congressional standing to defend federal laws because of the following assertion<sup>238</sup>: “We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.”<sup>239</sup> As Neal Devins and I have detailed elsewhere, however, there is no such history.

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<sup>233</sup> See *supra* notes 78-79 and accompanying text.

<sup>234</sup> See *supra* notes 83-84 and accompanying text.

<sup>235</sup> See 462 U.S. 919, 939-40 (1983) (“Congress is both a proper party to defend the constitutionality of § 244(c)(2) and a proper petitioner under 28 U.S.C. § 1254(1).”).

<sup>236</sup> The Court focused on adverseness, finding that the presence of the House and Senate counsel overcame any “prudential” concerns raised by the executive’s agreement with *Chadha*’s constitutional arguments. See *id.*

<sup>237</sup> *Id.* at 930-31.

<sup>238</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2714 & n.3 (2013) (Alito, J., dissenting) (asserting that any contention that “the Constitution confers on the President alone the authority to defend federal law in litigation” is “contrary to the Court’s holding in *Chadha*” and that *Buckley* “is not to the contrary[ because t]he Court’s statements there concerned enforcement, not defense”); Gorod, *supra* note 16, at 1249 (mentioning *Chadha* as one of repeated instances where Congress’s ability to participate in litigation has been recognized).

<sup>239</sup> *Chadha*, 462 U.S. at 940.

Prior to *Chadha*, members of Congress had occasionally participated as amici curiae to defend federal laws.<sup>240</sup> For example, the House of Representatives appointed a Special Counsel to appear as amicus in defense of the rider in *Lovett*.<sup>241</sup> But the Court did not authorize intervention by any component of Congress until *Chadha*. Given the lack of historical support for the Court's assertion,<sup>242</sup> and the fact that the Court did not even hold that the House or the Senate had standing to appeal, this one-sentence declaration in *Chadha* provides scant support for congressional standing to represent the federal government in court.

Notably, a denial of congressional standing does not prevent Congress from objecting to the manner in which the executive represents the federal government's interests. Congress may raise its concerns in a variety of ways, including public criticism, oversight hearings, the appropriations power, and (at the extreme) impeachment.<sup>243</sup> That political process may not always lead to results that satisfy all members of Congress. Nevertheless, "[s]low, cumbersome, and unresponsive though the [political] process may be thought at times,"<sup>244</sup> that is the mechanism by which the Constitution allows Congress to do battle with a recalcitrant executive. The Constitution does not grant Congress the affirmative authority to *replace* the executive as the government's representative in court.

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<sup>240</sup> See Grove & Devins, *supra* note 12, at 578, 586-93 (discussing the participation of members of Congress as amici curiae in legal disputes over the pocket veto, the removal power, and the rider in *Lovett*).

<sup>241</sup> 89 CONG. REC. 10,882 (1943). Indeed, that is one of the reasons the Solicitor General filed the certiorari petition in *Lovett*; as amicus, the Special Counsel could not appeal the Court of Claims' decision. See Petition for Writs of Certiorari to the Court of Claims, *supra* note 124, at 12-13. Of course, I argue that the executive also lacked standing to seek review in *Lovett*, given its refusal to defend the rider.

<sup>242</sup> Notably, the Court did not supply a basis for its assertion that there was a "long" history of congressional defense of statutes. The Court cited only two cases—*Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946). *Chadha*, 462 U.S. at 940. But *Cheng Fan Kwok* did not involve Congress at all; instead, the Court invited *private counsel* to appear as amici curiae to present an alternative interpretation of the statutory provision at issue because the INS agreed with the construction of the deportee. See 392 U.S. at 210 & n.9. In *Lovett*, of course, the House participated only as amicus. See 328 U.S. at 304.

<sup>243</sup> See Grove & Devins, *supra* note 12, at 597-603 (discussing the power of the House and the Senate to conduct investigations of the executive); *supra* notes 69-73 and accompanying text (discussing congressional oversight).

<sup>244</sup> *United States v. Richardson*, 418 U.S. 166, 179 (1974).

*B. The Normative Case Against Legislative Standing*

My argument against congressional standing to represent the United States rests primarily on the constitutional text and structure, as well as Supreme Court precedent denying Congress a direct role in law execution. At the same time, I believe there are strong normative reasons to prohibit Congress from transferring to itself the power to represent the federal government in court. Even if Congress had statutory standing only to *defend* federal laws, it would have immense discretion. No one, to my knowledge, contends that a congressional counsel would have a “duty to defend” every law or to appeal every lower court decision invalidating a law. Indeed, given the number of federal laws that are subject to constitutional challenge, any such duty would make the task of a congressional counsel infeasible—unless Congress created a second “Department of Justice” for the legislative branch. Advocates of congressional defense instead envision a counsel that would step in only when Congress concluded that the executive branch was derelict in its duties—by, for example, refusing to defend a law or offering what legislators perceived to be a less-than-enthusiastic defense.<sup>245</sup>

But absent a duty to defend in every case, the congressional counsel would have immense discretion to invoke federal jurisdiction, comparable to the discretion exercised by the executive under the intervention statute.<sup>246</sup> Such a discretionary power raises many of the same concerns as executive discretion. First, like the executive branch, Congress has strong incentives to refer controversial constitutional questions to the judiciary.<sup>247</sup> For

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<sup>245</sup> See *supra* note 16 and accompanying text; see also Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONGRESS & PRESIDENCY 131, 147 (1993) (observing that the House and the Senate counsel have sometimes participated in litigation, even when the executive defended the federal law, if they perceived that the executive was “equivocating in its support” of the statute).

<sup>246</sup> 28 U.S.C. § 2403 (2012). Indeed, early in the DOMA litigation, the House attempted to rely on § 2403 as a basis for intervention; the district court rejected that claim on statutory grounds. See *Windsor v. United States*, 797 F. Supp. 2d 320, 323 (S.D.N.Y. 2011) (holding that the statute only applies when the United States or an agency is not “already a party to the litigation”).

<sup>247</sup> Congress may, like the President, seek to advance a particular political agenda through the judiciary. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13, 516–17 (2002) (discussing the efforts of the Republican Party in the nineteenth century to use the judiciary to advance a pro-business agenda); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary if they believe “the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences”); see also John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the*

example, the *Windsor* decision relieved not only the executive branch but also members of Congress—at least those who believed that DOMA was unconstitutional and inflicting considerable harm on same-sex couples—from having to seek the law’s repeal.<sup>248</sup> Moreover, the Supreme Court’s invalidation of DOMA also took political pressure off other members of Congress, who might not have supported a law repealing DOMA but who did not want to expend political capital attempting to protect an increasingly unpopular statute.<sup>249</sup> Accordingly, there is good reason to believe that Congress, like the executive branch, would exercise its discretion to “invite the judiciary to resolve those political controversies that [legislators] cannot or would rather not address” themselves.<sup>250</sup>

Second, this restriction on congressional standing protects not only the judiciary but also the liberty of individuals who could be subjected to judicial

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*Federal Judiciary*, 39 J.L. & ECON. 435, 458–60 (1996) (showing that Congress tends to expand the size of the judiciary when “the enacting House, Senate, and president and the nominating president and confirming Senate” are politically aligned). Congress may also seek to defer to the courts on controversial political questions. See Graber, *supra* note 23, at 36 (arguing that “prominent elected officials consciously invite the judiciary to resolve” contentious issues); Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 584 (2005) (“The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.”).

<sup>248</sup> Notably, a group of Democratic Senators had introduced a bill to repeal DOMA. See 157 CONG. REC. S1754 (daily ed. Mar. 16, 2011) (statement of Sen. Leahy) (introducing the Respect for Marriage Act of 2011 in order to repeal DOMA); *id.* at S1753–54 (statement of Sen. Feinstein) (arguing that “under DOMA, the Federal government does not treat people equally or fairly”). The Supreme Court’s decision in *Windsor*, which was supported by many members of Congress, ended that political battle. See Kathleen Hennessey, *Democrats File Amicus Brief Challenging Defense of Marriage Act*, L.A. TIMES (Nov. 3, 2011), <http://articles.latimes.com/2011/nov/03/news/la-pn-house-democrats-doma-20111103> (observing that 133 House Democrats filed briefs in the DOMA litigation arguing that the law was invalid).

<sup>249</sup> See KLARMAN, *supra* note 145, at 161 (noting that by March 2011, polls showed that Americans opposed DOMA by fifty-one percent to thirty-four percent and increasingly supported same-sex marriage, and asserting that because of this changing political landscape, “the overall Republican response to the administration’s [nondefense of] DOMA was far more muted than it likely would have been just a couple of years earlier”); John Parkinson, *House Dems Tweet Jubilation, GOP Silent After DOMA Struck Down*, ABC NEWS (June 26, 2013), <http://abcnews.go.com/blogs/politics/2013/06/house-dems-tweet-rxn-to-doma-gop-silent> (describing the reaction of House Republicans to the *Windsor* decision as “muted”); Jake Sherman & Ginger Gibson, *GOP Leadership on DOMA: It’s Up to the States*, POLITICO (June 26, 2013), <http://www.politico.com/story/2013/06/gay-marriage-supreme-court-decision-republican-response-93423.html> (explaining that, though some Republicans criticized the *Windsor* decision, Republican leaders sought to end the “same-sex marriage fight . . . on Capitol Hill” because “the political dynamics of gay rights and gay marriage are shifting”).

<sup>250</sup> Graber, *supra* note 23, at 36.

process by a congressional counsel.<sup>251</sup> As noted, although a constitutional case may implicate various interests, given standing doctrine's grounding in the case-or-controversy requirement, one must consider the liberty of the parties—or the potential parties—to the “case.”<sup>252</sup> If Congress could represent the federal government in court (even if its role were limited to the defense of federal statutes), it would have the discretion to pick and choose which laws to defend and, more importantly, which cases to appeal—and thus which individuals to subject to further judicial process. For example, when the House of Representatives appointed counsel to defend DOMA, Speaker John Boehner made clear that the House would not intervene in or appeal every case: “[E]ffectively defending [DOMA] does not require the House to intervene in every case, especially when doing so would be prohibitively expensive.”<sup>253</sup>

As we have seen in the context of the executive branch, such discretion raises serious concerns about the arbitrary exercise of power. As Justice Jackson observed, when a government official can “choose his cases, it follows that he can choose” his opponents.<sup>254</sup> “Therein [lies the] most dangerous power”: the power to “pick people” the official “thinks he should get,” rather than the cases that need to be litigated.<sup>255</sup> Congress could decide to appeal (or not to appeal) a lower court decision for nefarious reasons—because the opposing party is “unpopular with the predominant or governing group, . . . attached to the wrong political views, or . . . personally obnoxious” to members of Congress.<sup>256</sup>

I am not suggesting that the House of Representatives was in fact motivated by any improper purpose in pursuing the *Windsor* case rather than

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<sup>251</sup> This analysis accords with those who emphasize that the separation of powers should be construed so as to protect individual liberty. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1539 (1991) (finding that the historical circumstances in which the Constitution was drafted support interpreting the separation of powers as a means of protecting individual rights); David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 309-10 (1990) (arguing that interpreting the separation of powers as a way of protecting the prerogatives of the federal branches leads to arbitrary decisions and that a better approach focuses on the protection of individual rights).

<sup>252</sup> See *supra* notes 186-87 and accompanying text.

<sup>253</sup> John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 15, 2011, at A18 (statement of Brendan Buck, spokesman for Rep. Boehner); see also Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY: POLIGLOT (July 7, 2011), <http://www.metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html> (noting the House's decision not to appeal a bankruptcy decision invalidating DOMA).

<sup>254</sup> Jackson, *supra* note 68, at 5.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

other appeals. The constitutional concern is not with the exercise of discretion in any particular case but with the risk created by largely unchecked discretion. Nor is it far-fetched to think that Congress might use broad discretionary power improperly. The facts underlying both *Lovett* and *Chadha* illustrate this point. In the 1940s, the House of Representatives was on a crusade to ferret out suspected communists from the federal government. One representative alleged that dozens of “crackpot, radical bureaucrats” had infiltrated the government,<sup>257</sup> and after a hearing conducted only by the House, three were singled out for dismissal: “Goodwin B. Watson, William E. Dodd, . . . and Robert Morss Lovett.”<sup>258</sup> In the 1970s, members of Congress were concerned that the executive branch was overly generous in granting suspensions of deportation and began to use the legislative veto more aggressively to overrule such suspensions.<sup>259</sup> In 1975, a House subcommittee concluded, “after reviewing 340 cases,” that Jagdish Chadha and five other undocumented immigrants “did not meet [the] statutory requirements” for suspension of deportation.<sup>260</sup> To this day, it is unclear why the House singled out Chadha and the others.<sup>261</sup>

Although there may be good reasons to restrict executive discretion to enforce federal law or to intervene in defense of federal law, there is little basis for transferring that same discretionary power to Congress. Indeed, the constitutional separation between legislative and executive powers seems to have been designed in large part to prevent Congress from exercising such discretionary power. As James Madison stated in *Federalist No. 47*, “When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner.”<sup>262</sup>

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<sup>257</sup> 89 CONG. REC. 479 (1943) (statement of Rep. Dies); *see also* *United States v. Lovett*, 328 U.S. 303, 308 (1946) (noting “the House of Representatives’ feeling in the late thirties that many ‘subversives’ were occupying influential positions in the Government”).

<sup>258</sup> Urgent Deficiency Appropriation Act, § 304, Pub. L. No. 78-132, 57 Stat. 431, 450 (1943).

<sup>259</sup> *See* CRAIG, *supra* note 130, at 21, 23-24 (observing that the number of legislative vetoes in this context increased considerably in the 1960s and 1970s).

<sup>260</sup> 121 CONG. REC. 40,800 (1975) (statement of Rep. Eilberg).

<sup>261</sup> *See* CRAIG, *supra* note 130, at 23 (observing that “no one then, or now, knows for sure what the reasoning was” behind the veto).

<sup>262</sup> THE FEDERALIST NO. 47, at 251 (James Madison) (George W. Carey & James McClellan eds., 2001) (quoting Montesquieu).

#### IV. IMPLICATIONS OF THE LIMITS ON EXECUTIVE AND LEGISLATIVE STANDING

Executive and legislative standing both depend on and are substantially constrained by Article II and Article I, respectively. This analysis has important implications for constitutional scholarship, particularly the ongoing debate over the executive's "duty to defend" federal statutes, and for federal litigation on behalf of the United States.

##### A. *The (Overlooked) Connection Between Defense and Execution*

Many of the scholarly assumptions about executive and legislative standing depend upon the widespread view that the enforcement of federal statutes can be analytically separated from the defense of those statutes in court. Thus, even scholars who strongly dispute the scope of the executive's "duty to enforce" federal laws agree that there is no "duty to defend."<sup>263</sup> For example, although Eugene Gressman insisted that "the President has no option under article II" but to faithfully execute *every* federal law, he also asserted that the executive always retains "the privilege of refusing to defend" a law in court.<sup>264</sup> Dawn Johnsen advocates a less categorical approach to enforcement but asserts that the executive should enforce most federal laws, particularly if that is the only way to "create[] the opportunity for . . . Supreme Court" review.<sup>265</sup> Professor Johnsen, however, also distinguishes defense from enforcement: "A decision not to defend a law raises vital questions of judgment, but not of potential constitutional transgression."<sup>266</sup> Finally, Neal Devins and Sai Prakash, who believe that the executive has a duty *not* to enforce any law that the President considers unconstitutional, assert that (at a minimum) the executive branch has a duty not to defend such a law.<sup>267</sup> Professors Devins and Prakash acknowledge that executive enforcement of a law may be justified as a way to tee up a

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<sup>263</sup> My review of the literature revealed that only two scholars (in one article) have argued that the executive's duty to enforce also requires it to defend a law. *See supra* note 105.

<sup>264</sup> Gressman, *supra* note 102, at 382, 383 n.17 (citation omitted). Professor Gressman took a different position as a litigator. He served as counsel for the House of Representatives in *Chadha* and argued that both the Ninth Circuit and the Supreme Court lacked jurisdiction over the case, in large part because of the executive's refusal to defend the statute. *See* Motion of Appellee U.S. House of Representatives to Dismiss, *supra* note 138 at 6-14; CRAIG, *supra* note 130, at 102-04 (explaining that Gressman made a tactical decision "to emphasize the jurisdictional questions in an effort to persuade the court to dismiss the case").

<sup>265</sup> Johnsen, *supra* note 15, at 51.

<sup>266</sup> Dawn Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 610 (2012).

<sup>267</sup> *See* Devins & Prakash, *supra* note 10, at 509-10.



constitutional issue for judicial—and, ultimately, Supreme Court—review.<sup>268</sup> But they insist that there is *no* justification for further requiring the executive to defend the law in court: “[T]here simply is no duty to defend federal statutes the President believes are unconstitutional.”<sup>269</sup>

Although the executive may have some discretion to decline to defend a law when another litigant invokes federal jurisdiction,<sup>270</sup> the executive has no such discretion when it seeks to invoke the federal judicial power. As I have demonstrated, the executive has standing to appear in court on behalf of the United States—to assert the government’s interests in the enforcement and continued enforceability of its laws. But the executive lacks standing when it fails to protect those interests—when it refuses to defend a law and instead seeks the law’s invalidation.

Notably, the executive has never asserted an alternative basis for executive standing in nondefense cases. The executive has consistently claimed that it has standing to assert the injury to the United States caused by the lower court’s invalidation of a federal law. Thus, in *Lovett*, the Solicitor General sought Supreme Court review to determine “the liability of the United States” to the three employees.<sup>271</sup> In *Chadha*, the Solicitor General contended that the executive was “aggrieved,” because the Ninth Circuit “order[ed] the Attorney General to ‘cease and desist from taking any steps to deport’” Chadha.<sup>272</sup> And, in *Windsor*, the Solicitor General claimed that “[t]he United States may properly invoke th[e Supreme] Court’s jurisdiction because the judgments of the courts below preclude enforcement of a federal statute.”<sup>273</sup> But if the executive invokes federal jurisdiction on behalf of the United States, then it has standing only to redress the injury to the United States. The executive must ask the appellate court to uphold the

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<sup>268</sup> *Id.* at 510; *see also id.* at 572 (“If one of the benefits of the current regime is that the courts, particularly the Supreme Court, ultimately decide the constitutionality of legislation, that benefit is no less present in an enforce-but-not-defend regime.”).

<sup>269</sup> *Id.* at 509; *see also* Waxman, *supra* note 15, at 1078 n.14 (“Whatever objections one might make under the Take Care Clause to a practice of nonenforcement, those concerns are virtually nonexistent in the nondefense context . . . .” (citation omitted)).

<sup>270</sup> As discussed, I do not address this issue, which is distinct from any question of executive standing. Any such refusal to defend would not deprive the court of Article III jurisdiction. *See supra* subsection II.B.1.

<sup>271</sup> Petition for Writs of Certiorari to the Court of Claims, *supra* note 124, at 9.

<sup>272</sup> Reply Brief for the Appellant, *supra* note 139, at 3.

<sup>273</sup> Brief for the United States on Jurisdictional Questions, *supra* note 154, at 6. *See also id.* (“The United States thus satisfies . . . the Article III requirement that it be ‘injured,’ by a lower court’s decision.”).

federal law. In short, in order to have standing to appeal, the executive has a duty to defend.

The assumption that “enforcement” can be separated from “defense” has also contributed to the widespread view that Congress has standing to defend federal laws on behalf of the United States.<sup>274</sup> But the interest of the federal government is the continued *enforceability* of the relevant law. Congress lacks the affirmative power to assert that interest in court and, accordingly, lacks Article III standing.

### B. *Practical Implications: Standing for the United States*

My arguments, of course, raise an important question. I contend that the executive lacks standing to appeal when it refuses to defend a law, and that Congress may not appeal in the executive’s stead. Moreover, there is currently no “independent counsel” who might step in to defend a law in place of the executive. (For now, I bracket the question whether Congress could create such a counsel with standing to appeal on behalf of the United States.<sup>275</sup>) That seems to leave a void: Who, if anyone, will represent the interests of the United States when its laws are struck down by a lower court?

There are, however, good reasons to assume that such a void would not exist if the judiciary enforced these standing restrictions on the executive branch and the legislature. The executive would in most cases face immense political pressure to appeal and to defend federal laws on behalf of the United States.<sup>276</sup> Both Congress and the President benefit from Supreme Court settlement of constitutional questions. This is in part because (as

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<sup>274</sup> See *supra* notes 230-32 and accompanying text.

<sup>275</sup> The Supreme Court upheld the use of an independent counsel to prosecute certain violations of federal law, but did so only after concluding that the counsel was subject to some oversight and control by members of the executive branch. See *Morrison v. Olson*, 487 U.S. 654, 695-96 (1988). This decision suggests that Congress may create some type of special counsel to defend federal laws. Given the *Morrison* Court’s emphasis on executive supervision, however, it is not clear whether Congress could create a counsel entirely “independent” of the executive branch. For now, I bracket that question and simply note that Congress’s power to delegate executive standing to represent the United States likely depends not only on Article III but also on Article II.

<sup>276</sup> The executive can be expected to face such political pressure whenever there is a dispute over the validity of the law at issue. There may, of course, be times when political actors agree that a law is unconstitutional. An example might be the law at issue in *Simkins v. Moses H. Cone Memorial Hospital*, which authorized construction grants for public and nonpublic hospitals, including those providing “separate-but-equal” facilities for different racial groups. 323 F.2d 959, 961 (4th Cir. 1963). The executive intervened under 28 U.S.C. § 2403 to argue that the statute was clearly “unconstitutional” in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Simkins*, 323 F.2d at 962. The Fourth Circuit agreed. See *id.* at 969-70.

social scientists have shown) any nationwide resolution of a legal question serves an important coordinating function; politicians and citizens benefit from knowing the rules of the game, even when they disagree with the “rules” chosen by the Supreme Court.<sup>277</sup> The executive also benefits for a more practical reason. It would be both expensive and administratively cumbersome if some lower courts were to strike down a law, thereby prohibiting the executive from enforcing the law in certain parts of the country, while the executive continued to enforce it elsewhere. Accordingly, the executive has a strong incentive to seek a nationally uniform ruling from the Supreme Court.

In theory, of course, the executive could itself provide that nationwide settlement. As discussed, the executive claims that it has the constitutional authority to refuse to enforce a federal law throughout the country when the President concludes that the law is invalid. But such unilateral action would be politically costly.<sup>278</sup> These political costs help explain why the Carter, Reagan, and Obama Administrations opted to fight the legislative veto and DOMA in the courts rather than refuse to execute those laws nationwide. Therefore, I believe that the executive would generally seek a Supreme Court resolution of a constitutional question—even though it would have standing to do so only if it defended the law. Such an approach would enable the executive to obtain the benefits of a uniform settlement of federal law without having to take political responsibility for providing that settlement itself.

Some scholars have suggested that the executive might not mount an adequate defense if the President considers a law to be unconstitutional.<sup>279</sup>

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<sup>277</sup> Various scholars have emphasized the coordinating function of judicial decisions. *See, e.g.*, ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 108 (2009) (asserting that “[i]f the constitution is vague[,] . . . [c]onstitutional review provides focal points for enforcement”); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market* (explaining how European courts help nations identify and monitor treaty violations), in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 173, 197–98 (Judith Goldstein & Robert O. Keohane eds., 1993). For discussions of the Supreme Court’s settlement function, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (emphasizing the Court’s role “as the authoritative settler of constitutional meaning”); Grove, *supra* note 6, at 944 (asserting that, within the judiciary, “only the Supreme Court can provide a definitive and nationally uniform resolution of federal law”).

<sup>278</sup> For a discussion of the political costs, see *supra* note 183.

<sup>279</sup> See Devins & Prakash, *supra* note 10, at 572 (suggesting that the Solicitor General might offer “a tepid defense of a law, . . . admit[ting] its constitutional infirmities”); Peter L. Strauss, *The President and Choices Not to Enforce*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 107,

But this argument overlooks the institutional culture and traditions of the Department of Justice. The DOJ often defends laws that the President deems invalid. For example, the George W. Bush Administration successfully defended campaign finance legislation that, in the President's view, "present[ed] serious constitutional concerns."<sup>280</sup> Accordingly, there is good reason to expect that DOJ lawyers will properly present the position of the government—regardless of the President's (or their own personal) views about the issue.<sup>281</sup> The DOMA litigation illustrates this point. Some of the same attorneys who defended DOMA during the Bush and early Obama Administrations continued to represent the government after the executive switched sides—and helped to prepare the government briefs urging the courts to strike down the law.<sup>282</sup>

Admittedly, the executive may decline to defend a federal law in at least some cases and thus, under the theory presented here, would lack standing to appeal. In that event, the federal government would have no representative in court to argue for the continued enforceability of the challenged law.<sup>283</sup> For several reasons, however, I do not believe that such a result would be troublesome, particularly if it were limited to only a handful of cases. First, if Supreme Court review is desirable, the issue could likely still reach the Court; if a lower court upheld the law, a private litigant could seek Supreme Court review. For example, because some lower courts had upheld the legislative veto (and, given the academic consensus in favor of the veto at that time, more were likely to do so<sup>284</sup>), the executive did not need to appeal *Chadha*'s case to obtain a Supreme Court resolution. The executive subjected *Chadha* to further judicial process because it "viewed *Chadha* as a promising case for attacking the legislative veto."<sup>285</sup> Second, in the event that the executive refused to defend a law and *every* lower court agreed with that position and held the law unconstitutional, it is not clear

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119-20 (doubting that an oath-bound President would defend "with enthusiasm" a law that he considered unconstitutional).

<sup>280</sup> Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503, 503 (Mar. 27, 2002); see also *McConnell v. FEC*, 540 U.S. 93, 223-24 (2003). The government's victory in *McConnell* was partially reversed by *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>281</sup> I base this assertion on my experience as a DOJ appellate litigator. See also Meltzer, *supra* note 10, at 1224-25 (making a similar observation based on his experience in the executive branch).

<sup>282</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (showing attorney August E. Flentje representing the government in opposing DOMA); *Smelt v. County of Orange*, 447 F.3d 673, 675 (9th Cir. 2006) (showing Flentje representing the government in supporting DOMA).

<sup>283</sup> Again, this argument assumes that there is no "independent counsel" to represent the United States. See *supra* note 275 and accompanying text.

<sup>284</sup> See *supra* note 188 and accompanying text.

<sup>285</sup> CRAIG, *supra* note 130, at 88.

why the matter would warrant Supreme Court review. In the DOMA litigation, once the Obama Administration argued that the law violated equal protection principles, every lower federal court to consider the issue struck down the law.<sup>286</sup> Given that judicial consensus, the executive surely had a strong basis for ceasing to enforce DOMA nationwide—and thereby end the harm the statute was causing individuals like Edith Windsor. Although the executive wanted the Supreme Court to provide a nationwide settlement, the executive could have (and arguably should have) provided that settlement itself.

Finally, it is important to consider the practical impact that a denial of executive standing would have on the individuals involved in the particular case. The denial of executive standing to appeal would mean that a citizen would no longer be subject to a law that, in the view of a lower court, violated her constitutional rights. Thus, the employees in *Lovett* could have recouped their salaries sooner; Jagdish Chadha would have been spared the threat of deportation years earlier; and Edith Windsor would have enjoyed the fruits of a lower court victory that validated her commitment to her same-sex spouse. In each case, the executive's appeal, at a minimum, delayed (and could have overturned) those lower court victories against the government. Although the federal government has an important interest in the continued enforceability of its laws, surely private citizens also have a substantial interest in the vindication of their constitutional rights—sooner, rather than later.

### CONCLUSION

Executive and legislative standing cannot be determined by Article III alone, but instead depend in large part on the provisions conferring power on those institutions—principally, Article II and Article I. This basic insight clarifies many questions about institutional standing. The Constitution does not grant Congress any power to represent the United States in federal court and instead directs the executive branch to “take Care that the Laws be faithfully executed.”<sup>287</sup> But the Take Care Clause does not give the executive branch an unqualified right to invoke the judicial power. The executive has standing to assert the federal government's interests in the

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<sup>286</sup> See, e.g., *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 17 (1st Cir. 2012) (holding the denial of federal benefits to lawfully married same-sex couples unconstitutional); *supra* note 152 (noting the lower court rulings in *Windsor*).

<sup>287</sup> U.S. CONST. art. II, § 3.

enforcement and continued enforceability of its laws. No provision of the Constitution, however, confers on the executive the power to invoke federal jurisdiction when it declines to defend a federal law. The executive lacks the affirmative power—and thus lacks Article III standing—to seek from the Supreme Court “a definitive verdict against [a] law’s constitutionality.”<sup>288</sup>

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<sup>288</sup> Holder Letter, *supra* note 27.